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Research  
Report

**24**

# **ENFORCING EUROPEAN UNION LAW ON EXPORTS OF DUAL-USE GOODS**

ANNA WETTER

This book identifies and assesses the role of national law enforcement actors and public prosecutors in the European Union in preventing the proliferation of weapons of mass destruction by stopping the illicit trade in dual-use goods. It centres around in-depth studies of the responses to several cases uncovered in Europe in the 1980s and 1990s, including the supply of sensitive items to Pakistan's nuclear weapon programme. The book argues that customs and prosecution standards need to be better coordinated between EU members in order to prevent the abuse of the EU's single market—particularly the free movement of goods. It also calls for coordination of penalties for offenders.

With more illegal exports of dual-use goods coming to light, *Enforcing European Union Law on Exports of Dual-use Goods* is an invaluable guide for public prosecutors and law enforcement actors, as well as for policymakers and anyone else who wants to understand this crucial aspect of the European non-proliferation regime.

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**Anna Wetter**

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## Preface

International treaties and agreements cannot prevent the proliferation of weapons of mass destruction unless they are implemented and enforced effectively. This lesson was driven home by the case of Abdul Qadeer Khan, a scientist who played a critical role in Pakistan's clandestine nuclear weapon programme and was the organizer of a worldwide nuclear smuggling operation that supplied Iran, Libya and North Korea with sensitive nuclear items. Khan, who was released this month from house arrest, depended for his activities on supplies of dual-use goods and technologies trafficked from countries—some members of the European Union (EU) among them—with laws on the books to combat nuclear proliferation, including through enforcing controls on the export of dual-use items.

The EU member states have a common basis for their dual-use export controls in the 2000 EC Dual-use Regulation. The regulation has supranational legal force, but the individual member states are responsible for enforcing its provisions. To date, the number of illegal exporters of dual-use goods to have been prosecuted in the EU remains small and their punishments have generally been lenient when seen in the light of the potentially grave consequences of their actions. The prosecution of long-term Khan associate and supplier Henk Slebos, whose prison sentence was recently extended to 18 months by an appeal court, was a landmark for Dutch export control enforcement, but his case could easily never have come to trial. A handful of dedicated and highly motivated customs officers, investigators and public prosecutors have become unsung heroes of non-proliferation.

*Enforcing European Union Law on Exports of Dual-use Goods* is intended as a major contribution not only to the academic debate—especially given that literature on this subject is almost non-existent—but also to ongoing efforts to strengthen export control enforcement. The report builds on SIPRI's long-standing work in the areas of export control and non-proliferation. It introduces and analyses the international and EU export control legislation and how it is put into force at the national level, highlighting the current trends, prospects and areas of debate. It describes the

relevant mechanisms for—and gaps in—EU cooperation in controlling the export of dual-use goods. It also presents case studies of investigations and prosecutions from four EU member states: Germany, the Netherlands, Sweden and the United Kingdom, and examines these countries' current export control enforcement systems. Finally, it offers recommendations for policymakers who seek to enhance and update national dual-use export controls.

Both the information and the analysis presented in this report owe much to the experiences and insights shared by prosecutors, law enforcers, licensing officers, representatives of EU institutions, policymakers and other experts at two meetings. The first of these was the Regional Seminar on Export Control Prosecutions, in Bled, Slovenia, in September 2006, organized by SIPRI and the Euro-Atlantic Council of Slovenia and sponsored by the EU Pilot Project Reinforcing EU Cooperative Threat Reduction Programmes and the US Export Control and related Border Security Assistance Program (EXBS). The second meeting was the seminar on Investigating and Prosecuting Offences related to the Illegal Export of Dual-use Goods in EU Member States co-hosted by SIPRI and the Swedish Prosecution Office for the Security of the State in Stockholm, Sweden, in September 2007 and sponsored by the European Commission's Directorate-General for Justice, Freedom and Security. I would like to offer sincere thanks to all the participants in these meetings, and particularly to Wim Boer, Panos Koutrakos, Axel Krickow, Klaas Leenman, Professor John McEldowney, David Peifer, Klaus-Peter Ricke and Frank Slijper. I would also like to thank Anna Wetter for her work with the SIPRI Export Control Project and to congratulate her for this exceptional and groundbreaking publication. Finally, thanks are due to the report's editors, Caspar Trimmer and Connie Wall.

Dr Bates Gill  
Director, SIPRI  
February 2009

# Abbreviations

AIVD	General Intelligence and Security Service (Algemene Inlichtingen- en Veiligheidsdienst, Netherlands)
AWG	Foreign Trade and Payments Act (Außenwirtschaftsgesetz, Germany)
BAFA	Federal Office of Economics and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, Germany)
BfV	Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, Germany)
BGBI	Federal Law Gazette (Bundesgesetzblatt, Germany)
BTWC	Biological and Toxin Weapons Convention
CBRN	Chemical, biological, radiological and nuclear (weapons)
CDUI	Central Import and Export Agency (Centrale Dienst voor In- en Uitvoer, Netherlands)
CEMA	Customs and Excise Management Act (United Kingdom)
CEPOL	European Police College
CFSP	Common Foreign and Security Policy
CGEA	Community general export authorization
CIS	Customs Information System
CSP	Customs Security Programme
CWC	Chemical Weapons Convention
DG-TAXUD	Directorate-General for Taxation and Customs Union
EAW	European arrest warrant
EC	European Community (or Communities)
ECJ	European Court of Justice
ECS	Export Control System
ECSC	European Coal and Steel Community
EEC	European Economic Community
EJN	European Judicial Network in Civil and Commercial Matters

EMU	European Monetary Union
EPC	European Political Cooperation
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
EUCPN	European Crime Prevention Network
Euratom	European Atomic Energy Community
Eurojust	European Union Judicial Cooperation Unit
Europol	European Police Office
FIOD-ECD	Fiscal Investigation and Information Service– Economic Investigation Service (Fiscale Inlichtingen en Opsporingsdienst–Economische Controle Dienst Belastingdienst, Netherlands)
FOA	Swedish Defence Research Establishment (Försvarets forskningsanstalt; now the Swedish Defence Research Institute; Totalförsvarets forskningsinstitut, FOI)
GAERC	General Affairs and External Relations Council
HMRC	Her Majesty’s Revenue and Customs (United Kingdom)
IAEA	International Atomic Energy Agency
IIA	Institute of Industrial Automation (Pakistan)
ISP	Inspectorate of Strategic Products (Inspektionen för strategisk produkt, Sweden)
KWKG	War Weapons Control Act (Kriegswaffen- kontrollgesetz, Germany)
MANPADS	Man-portable air defence systems
MTCR	Missile Technology Control Regime
NBC	Nuclear, biological and chemical (weapons)
NCG	Namchogang Corp.
NCTb	National Coordinator for Counterterrorism (Nationaal Coördinator Terrorismebestrijding, Netherlands)
NPT	Nuclear Non-Proliferation Treaty
NSG	Nuclear Suppliers Group
OLAF	European Anti-fraud Office

OPCW	Organisation for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Co-operation in Europe
PCTF	European Police Chiefs Task Force
PJCC	Police and Judicial Co-operation in Criminal Matters
POSS	Precursors, EU fraud and strategic goods and sanctions (Precursoren, oorsprong en strategische goederen en sancties)
PSI	Proliferation Security Initiative
QMV	Qualified majority vote
RCPO	Revenue and Customs Prosecutions Office (United Kingdom)
REACH	Registration, Evaluation and Authorization of Chemicals
SÄPO	Swedish Security Service (Säkerhetspolisen)
SFS	Svensk författningssamling (Swedish Code of Statutes)
Stb.	State Gazette (Staatsblad, Netherlands)
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TEA	Triethanolamine
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNSCOM	United Nations Special Commission on Iraq
WMD	Weapon(s) of mass destruction
WMD-MC	Weapons of Mass Destruction Monitoring Centre
ZKA	Customs Criminological Office (Zollkriminalamt, Germany)

# Glossary

- Administrative sanction (administrative penalty) In the context of this report, any formal penalty applicable for offences defined as regulatory under the prevailing legal system. Administrative sanctions in the area of export control often take the form of fines or other financial penalties, the confiscation or destruction of property, the suspension or revocation of a licence, or the withdrawal of privileges such as simplified customs procedures. Administrative sanctions may be applicable without formal judicial proceedings. See also *criminal sanction*. This report does not distinguish between sanctions and penalties, as some legal systems do. The precise definition of ‘administrative sanction’ may vary between jurisdictions.
- Annex lists Lists included in annexes I and IV of the *EC Dual-use Regulation*. The Annex I list includes all dual-use items that should not be exported from the European Community without authorization. The Annex IV list includes items in the Annex I list that should not be transferred between member states without authorization. The annex lists implement the *control lists* of the international non-proliferation regimes, including the Australia Group, the Chemical Weapons Convention, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement. The annex lists are frequently updated.
- A. Q. Khan network An international procurement operation coordinated by Dr Abdul Qadeer Khan, a Pakistani nuclear scientist. Khan led Pakistan’s nuclear weapon programme, procuring goods and technologies through networks of private actors around the world. He also confessed in 2004 to



selling nuclear technology to Iran, Libya and North Korea. The activities of the Khan network are thought to constitute the most extreme loss of state control over nuclear technology to date. Dutch businessman Henk Slebos (see chapter 6) is believed to have operated as part of the Khan network.

Broker

A natural or legal person who negotiates or arranges the purchase, sale or transfer of assets on behalf of third parties. Only some EU member states have legislation criminalizing the brokers of unlicensed exports of dual-use goods. In the context of EU arms trade controls, ‘broker’ is used to refer specifically to a natural or legal person who negotiates or arranges deals involving the transfer of listed military equipment between third countries or who buys, sells or arranges the transfer of listed military equipment between third countries. There is some debate about whether this usage should be extended to EU dual-use export controls.

Catch-all clause

An instrument whereby state authorities may impose a licence requirement for an export of an item or items not currently on a control list. For such a requirement to be valid, an appropriate catch-all warning (or catch-all notification) must have been received by the exporter before the export has taken place. Some catch-all clauses also impose a licence requirement if the potential exporter knows (in some legislation, suspects or has reason to believe) that the intended end-use is related to WMD proliferation. Article 4 of the EC Dual-use Regulation constitutes a catch-all clause.

Community general export authorization (CGEA)	A general authorization on the export from the Community of dual-use items to certain countries. The current CGEA conditions are given in Annex II of the EC Dual-use Regulation.
Control list	A list of items, such as dual-use items, subject to export controls.
Council of the European Union (the Council, EU Council, Council of Ministers)	The decision-making organ of the EU. Each of the member states is represented in the Council by the government minister responsible for the matter on the agenda. The Council shares legislative powers with the <i>European Parliament</i> . The Council should not be confused with the <i>European Council</i> or with the Council of Europe (a non-EU body that coordinates work around the European Convention for Human Rights).
Court of First Instance	An independent court attached to the <i>European Court of Justice</i> . The Court of First Instance has jurisdiction in matters related to the interpretation of the treaties constituting the <i>European Community</i> and the provisions adopted under them. Its judgements may be subject to appeal in the European Court of Justice.
Criminal sanction (penal sanction, criminal penalty)	In the context of this report, any penalty applicable for an offence defined as criminal under the prevailing legal system. Criminal sanctions include measures that deprive a person of their liberty—for example imprisonment. They may also include fines or other financial penalties. Criminal law is enforced by specialized agencies. In democratic states, defendants can only be convicted under criminal law when their crime is proved beyond doubt. See also <i>administrative sanction</i> . The precise definition of ‘criminal sanction’ may vary between jurisdictions.

Diversion	The transfer of controlled items to unauthorized end-users, directly, through in-country transfers or through unauthorized re-exports.
Dual-use	Having both potential civil and potential military applications. Dual-use items are goods and technologies of a dual-use nature.
EC Dual-use Regulation	The most recent version of Council Regulation (EC) 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology. The main common export control legislation for dual-use goods in the <i>European Community</i> . Its provisions are <i>supranational</i> . It contains <i>annex lists</i> of controlled items.
EC Customs Code	Contains, along with its implementing provisions, the basic customs legislation of the <i>European Community</i> . The current version is the Modernized Customs Code, established by Council and Parliament Regulation (EC) 450/2008 laying down the Community Customs Code (Modernised Customs Code), which entered into force in June 2008. This replaced the original Community Customs Code established by Council Regulation (EEC) 2913/92.
End-use	The ultimate use of an exported item.
End-user	The ultimate user of an exported item. The end-user is not a forwarding agent or intermediary but may be the purchaser or consignee.
European Commission (the Commission)	The executive branch of the EU. Among its tasks are proposing legislation, implementing legislation adopted by the <i>Council</i> in its areas of competence (which are primarily those under the <i>European Community</i> ) and upholding the European treaties. Its membership is appointed by agreement between the member states and approved by the <i>European Parliament</i> .

- European Community (EC) An arrangement among European states to define and implement common policies in numerous areas, including a customs union, a single market, external trade, border controls and competitiveness. Called the European Economic Community (EEC) until 1992. Currently the first ‘pillar’ of the European Union. If the 2007 Treaty of Lisbon comes into effect, the pillar structure will be abolished and the EU will absorb the functions of the EC. The founding treaty of the EC is the *Treaty establishing the European Community*.
- European Council (European Summit) The highest political body of the EU, comprising the heads of state or government of the member states and the president of the Commission. It defines the general political guidelines of the EU. The European Council should not be confused with the *Council of the European Union* or with the Council of Europe.
- European Court of Justice (ECJ) The EU court responsible for ensuring the effective and uniform application of *European Community* legislation and for preventing differing interpretations. It advises the national courts of the member states on request on issues related to the implementation of EC legislation and passes rulings in cases referred to it by the member states or by one of the EU organs on matters related to the interpretation of the treaties.
- European Parliament The only directly elected body of the EU. Along with the *Council*, it forms the highest legislative body of the EU in the Community pillar. The Parliament plans the EU’s legislative programme jointly with the Council and the *Commission*. It has power to amend and reject some

legislative bills proposed by the *Commission*. In other areas, it may only submit communications to the Council. In these cases, the Council is not bound by the Parliament's opinion. The Parliament is responsible for the EU's annual budget. Except in special circumstances, the Parliament does not directly propose legislation.

- Export** In the context of the EU, the transfer of items from an EU member state to a *third country*. A re-export is an export of an item that has previously been imported into the *European Community*.
- Export authorization** Four types of export authorization are available to EU member states, as provided for under the *EC Dual-use Regulation*: (a) *Community general export authorizations*; (b) *national general export authorizations*; (c) *global authorizations*, granted to an individual exporter and covering several types or categories of items to several countries; and (d) *individual licences*, generally granted to one exporter and covering exports of specific types or categories of items to one end-user. National export authorizations must be based on a model provided in Annex IIIa of the *EC Dual-use Regulation*. They are valid throughout the European Community.
- Exporter** In the context of the *EC Dual-use Regulation*, a natural or legal person on whose behalf an *export* declaration is made and who, when it is accepted, owns the goods in question or has a similar right of disposal over them. Where ownership or a similar right of disposal belongs to a person established outside the Community, the exporter is the contracting party established in the Community.

General prevention	A legal theory holding that people will be deterred from committing crimes by the establishment of exemplary sanctions and systems for their application. See also <i>special prevention</i> .
<i>Ne bis in idem</i> (double jeopardy)	A legal principle establishing that no legal action can be instituted twice for the same cause of action against one individual.
<i>Official Journal of the European Union</i>	The gazette of record of the EU. All EU legislative acts (e.g. treaties, directives, regulations, decisions, opinions and recommendations), are published in the L series. Other EU information and notices, including <i>European Court of Justice</i> rulings, are published in the C series. Previously known as the <i>Official Journal of the European Communities</i> .
Outreach	Activities aimed at engaging directly with a target community for purposes such as awareness raising, information or dialogue. In the context of this report, it generally refers to efforts by authorities to maintain contact with exporters and producers of dual-use goods, for example to alert them to export licensing and procedures.
Proliferation-sensitive	In the context of this report, capable of being used relatively easily in the development of a weapon of mass destruction.
Sensitive destination	In the context of this report, a state to which exports of military and dual-use items are of security concern—for example, one subject to either EU or UN export sanctions.
Simplified procedures	Under Article 76 of the EU Customs Code, EU member states may grant individual exporters the right to use simplified export declaration procedures—for example, requiring less comprehensive documentation and waiving the

- requirement to present goods for export to customs authorities when submitting a declaration. The procedures are defined in Commission Regulation (EEC) 2454/93 of 2 July 1993, articles 252 and 283–287.
- Special prevention A theory of crime prevention based on the premise that incapacitating offenders by imprisonment will disrupt their criminal activities and those of their associates if they belong to criminal networks. See also *general prevention*.
- Supranational The laws of states are held inapplicable when they conflict with a supranational legal system that applies to them by virtue of their membership of an organization. The *EC Dual-use Regulation* is an example of the EU's supranational common legislation. For supranational law to come into existence, states must confer upon an external entity the competence to legislate in the relevant area. States thus cede aspects of their sovereign authority.
- System of denial notifications A system whereby notifications of denials of export licences for dual-use goods are shared between member states, in accordance with Article 9 of the *EC Dual-use Regulation*. The *European Commission* coordinates the sharing of denial notifications, which are entered in a common database.
- Third country In the context of the EU, any state that is not an EU member state.
- Treaty establishing the European Community (TEC, Treaty of Rome) Originally the Treaty establishing the European Economic Community, signed in Rome on 25 March 1957. The TEC lays down the main principles for the common market and the Customs Union. It has been amended by the 1986 Single European Act, the 1992 Maastricht Treaty (which gave the TEC its current name),

the 1997 Treaty of Amsterdam and the 2001 Treaty of Nice. The 2007 Lisbon Treaty would further amend the TEC and rename it the Treaty on the Functioning of the European Union (TFEU). References in this volume are to the Treaty of Nice version of the TEC.

Treaty on  
European Union  
(TEU)

The founding treaty of the European Union. The purpose of the TEU was to create a union to supplement the policies of the European Communities with new forms of cooperation. Areas of cooperation that were introduced by the treaty are the common foreign and security policy (CFSP) and justice and home affairs. The original TEU was signed in Maastricht on 7 Feb. 1992. It has since been amended by the 1997 Treaty of Amsterdam and the 2001 Treaty of Nice. The 2007 Treaty of Lisbon would further amend it. References in this volume are to the Treaty of Nice version of the TEU.



# 1. Introduction

The use of a weapon of mass destruction (WMD) could have a devastating impact for humankind and for the global environment. Even the materials for a nuclear, biological or chemical (NBC) weapon can pose serious risks. The 2006 test of a nuclear weapon by the Democratic People's Republic of Korea (North Korea) and Iran's suspected nuclear weapon programme—not to mention the nuclear arsenals of India, Israel and Pakistan—have raised important questions about the effectiveness of the range of national and international measures to prevent WMD proliferation and of the systems tasked with monitoring their implementation.<sup>1</sup>

The failures of non-proliferation have occurred partly because of weaknesses in the control of the trade in dual-use items—goods and technologies that were not specifically designed or developed for military purposes but have both civil and potential military applications—including, in some cases, in the development of WMD.<sup>2</sup> The trade in dual-use items offers significant commercial and strategic benefits for the individuals and states involved, ensuring that there are always some who are willing to run the associated risks. The crucial role that the detection and investigation of export violations and the prosecution of the offenders can play in preventing the most sensitive items from reaching those who wish to proliferate WMD—whether irresponsible regimes or non-state actors—is not always fully appreciated, even by national governments. The enforcement of export controls on dual-use goods is an important complement to the international agreements and multilateral export control regimes and dialogues aimed at limiting the proliferation of WMD. It often depends on the vigilance of individual front-line customs officers and the dedication of a few customs investigators and prosecutors.

<sup>1</sup> For estimates of the size of the world's nuclear forces see Kile, S. N., Fedchenko, V. and Kristensen, H. M., 'World nuclear forces, 2008', *SIPRI Yearbook 2008: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2008), pp. 366–98.

<sup>2</sup> On the term 'dual-use' see the glossary in this volume. This study focuses on dual-use goods (products, equipment, materials etc.) with potential application in the development of weapons of mass destruction. It does not deal with dual-use technologies, which may take the form of plans, instructions, software, technical assistance etc.

As the discovery of several illicit transfers of dual-use goods from the European Community (EC) since the 1980s clearly shows, states may unknowingly harbour individuals and companies involved in the trade in proliferation-sensitive items. From the 1980s the A. Q. Khan network—effectively a network of networks of private actors, coordinated by the Pakistani nuclear scientist Abdul Qadeer Khan, that sold sensitive products and technology to the highest bidders—exploited the Dutch market in dual-use goods.<sup>3</sup> In the 1990s the German media helped to expose the involvement of German companies in the export of sensitive items to Iraq, presumably in support of a clandestine Iraqi nuclear weapon programme. The low awareness of the WMD proliferation threat and weak national export control laws and enforcement systems found at the time in Germany and the Netherlands—as in much of the rest of Europe—allowed these countries’ industrial and research infrastructures to be abused and sensitive goods to be illegally exported, with relatively little difficulty.

Strictly enforcing export controls and bringing offenders to justice—which require effective systems for law enforcement that, importantly, are in accordance with the rule of law—is essential for achieving international non-proliferation objectives. Yet most member states of the European Union (EU) have conducted few or no prosecutions for export control violations related to dual-use goods, despite having large industries producing or trading in such items. It could be that they have virtually spotless prevention and compliance records, but it is more likely that the national authorities have failed to detect or prosecute violations. This report is intended to shed light on some of the significant challenges facing the EU law enforcement communities and prosecution authorities in their efforts to combat the illicit trade in dual-use goods—and to offer some practical insight into how to overcome these challenges.

<sup>3</sup> On the A. Q. Khan network see the glossary in this volume. See also Levy, A. and Scott-Clark, C., *Deception, Pakistan, the United States and the Global Nuclear Weapons Conspiracy* (Atlantic Books: London, 2007); Spector, L. S., Goren, N. and Salama, S., Monterey Institute Center for Nonproliferation Studies, ‘Special report: the A. Q. Khan network: crime . . . and punishment?’, *WMD Insights*, no. 3 (Mar. 2006); and International Institute for Strategic Studies (IISS), *Nuclear Black Markets: Pakistan, A. Q. Khan and the Rise of Proliferation Networks: A Net Assessment*, IISS Strategic Dossier (IISS: London, May 2007). See also the case study in chapter 6, section III, in this volume, which concerns the investigation and prosecution of a suspected member of a Khan associate.

## I. Dual-use export controls and non-proliferation

Following the discovery that their dual-use goods industries had been abused the Dutch and German authorities took action to strengthen their export control systems. Germany undertook an extensive revision of both its export control legislation and its enforcement system in the early 1990s. The export control system that emerged is among the most effective in the world, judged by the number of investigations that have led to prosecutions.<sup>4</sup> However, many policymakers in other EU member states are probably still insufficiently aware of the risk that their industries could be abused for illegal exports of sensitive goods or, equally importantly, that their territories could be used as transit routes for such exports. Consequently, they may not understand the crucial importance of regularly reviewing their national export control systems. The gap between the likely number of illegal activities and the actual number of prosecutions is an indication that EU member states may not be properly putting into force the international, multilateral and EU export control legislation. Given the significant dual-use goods industries in Europe, EU governments cannot afford to ignore the problem: they need to assess the effectiveness of their export control systems and make sure their law enforcement communities and prosecution services are provided with the necessary resources to contribute to non-proliferation efforts.

United Nations (UN) Security Council Resolution 1540, adopted in 2004, gives states a significant incentive to do so.<sup>5</sup> Resolution 1540 enshrines in international law an obligation on all member states to maintain effective national enforcement mechanisms to prevent non-state actors from acquiring WMD materials and means of delivery. It also obligates all UN member states to have either criminal or civil penalties in place for violations of export control laws. National law enforcement mechanisms and their weaknesses are thus exposed to scrutiny at the international level.

<sup>4</sup> International Institute for Strategic Studies (note 3).

<sup>5</sup> UN Security Council Resolution 1540, 28 Apr. 2004. For this and other Security Council resolutions see <[http://www.un.org/Docs/sc/unsc\\_resolutions.html](http://www.un.org/Docs/sc/unsc_resolutions.html)>. States have made non-proliferation commitments in 3 international treaties; see chapter 2 in this volume.

Resolution 1540 is only the second Security Council resolution in the UN's history that requires member states to report on their national implementation measures to a specially established group, in this case the 1540 Committee.<sup>6</sup> The obligation to disclose information about national law enforcement also broke new ground in international law, as such activity has traditionally been a matter of state sovereignty.<sup>7</sup> The introduction of this reporting system arguably reflected an agreement among the five permanent members of the Security Council—China, France, Russia, the United Kingdom and the United States—that new approaches were needed to address the risk of WMD falling into the hands of non-state actors.

## II. Dual-use export controls in the European Union

For EU member states, Council Regulation (EC) 1334/2000 (the EC Dual-use Regulation) is the main instrument for controlling the export of dual-use items from the EU to third countries.<sup>8</sup> It is legally binding, supranational EU legislation and obligates all member states to set up effective national systems and procedures to enforce the legislation and to include 'effective, proportionate

<sup>6</sup> The 1540 Committee comprises representatives of all 15 permanent and temporary members of the UN Security Council. See the website of the 1540 Committee, <<http://www.un.org/sc/1540/>>. On 25 Apr. 2008 the Security Council extended the mandate of the 1540 Committee until 2011 with the adoption of Resolution 1810. The first Security Council resolution to include an obligation for UN member states to submit reports on their implementation measures to a UN committee was Resolution 1373 of 28 Sep. 2001, on counterterrorist steps and strategies, etc. The 15-member Counter-Terrorism Committee (which also comprises the current members of the Security Council) monitors compliance with Resolution 1373. See the committee's website, <<http://www.un.org/sc/ctc/>>.

<sup>7</sup> The principle of state sovereignty is codified in Article 2(1), of the 1945 UN Charter and in the 1933 Montevideo Convention on the Rights and Duties of States. Sovereignty denotes the competence, independence and legal equality of states.

<sup>8</sup> Council Regulation (EC) 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, *Official Journal of the European Communities*, L 159, 30 June 2000. The regulation has been regularly updated and amended. The latest amended version can be found in Council Regulation (EC) 1167/2008 of 24 Oct. 2008 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, *Official Journal of the European Communities*, L 325, 3 Dec. 2008. See also Anthony, I. and Bauer, S., 'Transfer controls', *SIPRI Yearbook 2006: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2006), pp. 786–89. On the term 'third country' see the glossary in this volume.

and dissuasive' penalties in their respective national laws.<sup>9</sup> The EC Dual-use Regulation includes annexes that list the items on which it has been agreed that export controls should be imposed. These are regularly coordinated with the control lists of the multilateral export control regimes.<sup>10</sup> Article 4 of the regulation constitutes a 'catch-all clause': it provides that export authorization is required for dual-use items that are not listed in Annex I if the exporter has been informed by the competent authorities that such items may be intended for use in the development of NBC weapons. It also obligates exporters who are aware of the dual-use nature of an uncontrolled item to report this fact to the authorities. This clause is meant to fill gaps in the lists resulting from rapid technological developments and to exclude the procurement of items just below the threshold of the licensing requirements.<sup>11</sup>

The common EC export control system for dual-use items builds on the basic EC principle of the free movement of goods. It explicitly requires member states to honour each other's licensing and customs decisions relating to exports to countries outside the EU area. This makes it important that national enforcement measures are equally effective in all the member states. As long as they are not, irresponsible traders of dual-use goods may try to use the most porous external EU borders—those at which they run the least risk of detection—for their illegal exports. National systems set up to give force to the EU export control legislation are thus a matter of concern for the EU as a whole. However, under the current EU system, it is up to individual member states to decide how they will give force to the common legislation.

A related risk is that irresponsible traders will choose the EU state with the lightest penalties from which to conduct illegal exports. Arguably, this risk will increase the larger the disparities between the sanctions applied by the individual member states. This raises the question of whether national sanctions for export

<sup>9</sup> Council Regulation 1334/2000 (note 8), Article 19. On the term 'supranational' see the glossary in this volume.

<sup>10</sup> On the annex lists and the term 'control list' see the glossary in this volume. The 4 principal multilateral export control regimes are the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies. See chapter 2, section III, in this volume.

<sup>11</sup> On Article 4 of the EC Dual-use Regulation see chapter 4, section I, in this volume.

offenders should be harmonized within the EU. A survey of the sanctions applicable for export control violations in EU member states conducted by the European Commission in 2005, in response to Security Council Resolution 1540, highlighted the wide disparities that exist today.<sup>12</sup> A draft proposal for amending the EC Dual-use Regulation submitted by the Commission in 2006 suggests that the Commission would like to see the EU, using its EC competences, assume a supervisory role in relation to national export control legislation.<sup>13</sup> The proposal includes a suggested obligation on member states to apply criminal penalties for serious dual-use export control offences.

### III. The importance of bringing violators to justice

Bringing export control violators to justice can serve a twofold function in preventing WMD proliferation. First, convictions leading to any type of penalty could help to deter the general public from attempting to commit similar offences. This principle is often called ‘general prevention’. Second, a conviction leading to a prison sentence may stop an offender from committing further crimes. This is referred to as ‘special prevention’. If the offender is a member of a larger proliferation network, the conviction could also contribute to disrupting wider illegal activities and result in other disclosures.<sup>14</sup>

<sup>12</sup> See European Commission, Directorate-General for Trade, Working Party on Dual-use Goods, Report on the answers to the questionnaire DS6/2005 rev 3 on existing sanctions—implementation of Article 19 of Council Regulation 1334/2000, DS 37/4/2005 Rev. 4, 11 May 2006; and ‘Sanctions imposed by EU Member states for violations of export control legislation’, Draft Rev. 14, Sep. 2005. On the penalties applied by individual member states see chapter 4, section IV, and appendix A in this volume.

<sup>13</sup> European Commission, Communication from the Commission on the review of the EC regime of controls of exports of dual-use items and technology, COM(2006) 828 final, Brussels, 18 Dec. 2006. For this and other European Commission documents since 2001 see <<http://ec.europa.eu/transparency/regdoc/recherche.cfm?CL=en>>.

<sup>14</sup> The idea that criminal law could serve this role in the enforcement of EC legislation has been raised e.g. in an article on a significant 2005 ruling by the European Court of Justice. Pereira, R., ‘Environmental criminal law in the first pillar: a positive development for environmental protection in the European Union’, *European Environmental Law Review*, vol. 16, no. 10 (Oct. 2007), pp. 254–68. For the ruling see European Court of Justice, Case C-176/03, *Commission vs Council*, Judgement of 13 Sep. 2005, *European Court Reports*, 2005, p. I-7879

The two theories of general and special prevention are useful to keep in mind when selecting sanctions to apply for export control violations, because traders who deliberately breach export controls generally fall into one of two categories. The first category, those motivated primarily by the potentially large sums on offer from proliferators, can usually be deterred by legislation providing for strict penalties (such as long prison sentences and heavy fines) for export control violations, especially if they believe that there is a good possibility of detection and prosecution. While usually heedless or ignorant of the proliferation threat, this group will not violate export controls at any cost. The second category consists of those with an actual intent to develop WMD or spread WMD materials. A. Q. Khan is an example of such a proliferator. His aim was to contribute to Pakistan's WMD programme and seemingly also to the nuclear programmes of several other states. Neither Khan nor his collaborators were deterred by either enhanced law enforcement procedures or increased penalties for breaches of export control laws. Their case highlights the need for successful interceptions, investigations and convictions to interrupt illicit activities.<sup>15</sup>

Prosecutions and harsh penalties can serve an additional preventive function by attracting media attention to export control violations. Media reporting of court proceedings exposes suspects and their companies to public notice, raises awareness of the applicable punishments and sends a clear message to those involved in illegally supplying regimes and non-state actors trying to develop WMD that their attempts to do so may be discovered and thwarted. Publicly connecting a prosecution with the intended recipient of an illegal export of dual-use goods may also expose that state or group to unwelcome publicity.

<sup>15</sup> The Pakistani authorities sought to prevent A. Q. Khan from further proliferating nuclear technology and materials by placing him under house arrest after he confessed publicly in Feb. 2004 to helping transfer nuclear secrets and technology to Iran, Libya and North Korea. On the A. Q. Khan network see the glossary and note 3 in this volume.

## IV. This report

Exporting industries, researchers dealing with proliferation-sensitive items and even many actors involved in controlling the trade in dual-use goods lack sufficient awareness of the many challenges in enforcing dual-use export controls. In the EU, these actors range from policymakers at both the member state and EU levels, legislators, licensing and law enforcement officials, and prosecutors. This report aims to fill this gap in knowledge with comprehensive coverage of the facts and issues—and in so doing, to contribute to global efforts to prevent the proliferation of WMD.

The report describes the various frameworks—international, EU and national—that influence export control in the EU, as well as the structures involved. To illuminate the current situation it considers some of the national models for law enforcement and prosecution used by EU member states to implement and enforce export control legislation, including the EC Dual-use Regulation and the relevant international agreements and UN Security Council resolutions.

The international context and legal framework for WMD non-proliferation, in which the EU member states and all other UN states operate, is set out in chapter 2. Chapter 3 describes the relevant institutional and legal frameworks in the EU. Chapter 4 looks at the basics of how member states give force to the EU legislation at national legislation. Chapter 4 surveys some of the cooperative EU agencies that could play a role in supporting dual-use export control efforts at the national and EU levels. Chapter 6 presents four case studies. These include accounts of prosecutions of crimes involving dual-use goods in Germany, Sweden, the Netherlands and the United Kingdom, illustrating some of the issues and problems that characterize export control in practice. Each account is followed by an overview of the national legislation related to export controls on dual-use goods and the national systems established to detect, investigate and prosecute violations. The final chapter offers conclusions and a set of recommendations for tailoring national legislation and enforcement and prosecution systems to the task of controlling exports of dual-use goods and thus giving force to the provisions of the EC Dual-use Regulation and international non-proliferation obligations.



The report is based on research conducted between 2006 and 2008 and on the author's work as a member of the SIPRI Export Control Project between 2005 and 2007. Much of the information comes from the author's communications with law enforcement actors and prosecutors from several EU member states, along with representatives of the European Commission, Europol, Eurojust and international organizations. The outcomes of two conferences on investigating and prosecuting export control violations co-organized by SIPRI in 2006 and 2007 provided the foundations for much of the analysis and recommendations in the report.<sup>16</sup>

<sup>16</sup> The 2 events were the Regional Seminar on Export Control Prosecutions, Bled, Slovenia, 25–26 Sep. 2006, sponsored by the EU pilot project Reinforcing EU Cooperative Threat Reduction Programmes: Community action in support of the EU Strategy Against the Proliferation of Weapons of Mass Destruction on Enhancing Cooperative Threat Reduction to Support the Implementation of the EU's Strategy against the Proliferation of Weapons of Mass Destruction and the US Export Control and related Border Security Assistance Program (EXBS), organized by SIPRI and the Euro-Atlantic Council of Slovenia; and the seminar on Investigating and Prosecuting Offences related to the Illegal Export of Dual-use Goods in EU Member States, Stockholm, Sweden, 10–12 Sep. 2007, sponsored by the European Commission's Directorate-General for Justice, Freedom and Security and co-hosted by SIPRI and the Swedish Prosecution Office for the Security of the State.

## 2. The international context

### I. The international non-proliferation agreements

The end of the cold war and the emergence of a new global power structure re-energized debate about nuclear disarmament and brought with it hope that the world might see the elimination of nuclear weapon stockpiles. However, there was also concern about what would happen to the WMD and proliferation-sensitive materials that were left unsupervised on the territory of the former Soviet Union. When the Soviet Union broke up in December 1991, about 35 000 nuclear weapons were distributed across the newly independent states.<sup>17</sup> By 1995, 1100–1300 tonnes of highly enriched uranium and 165 tonnes of separated plutonium were held at more than 50 sites across Russia, and significant stocks were located in Belarus, Kazakhstan and Ukraine.<sup>18</sup> According to Jozef Goldblat, a prominent researcher on WMD non-proliferation and disarmament, these circumstances, as well as the fact that weapon-grade fissile materials can be handled and transported relatively safely and cannot easily be detected by law enforcement authorities, created conditions that facilitated nuclear theft and smuggling.<sup>19</sup>

A parallel discussion about how to prevent the further proliferation of WMD was given urgency by indications that India, Iran, Iraq, Israel, North Korea, Libya and Pakistan had embarked on, or were exploring the feasibility of, nuclear programmes. It was thought that the suspected and confirmed WMD programmes in these ‘states of concern’ were to a large extent facilitated by technological advances made during the cold war, not only for military purposes but also for civil applications. While technology that had previously been used exclusively for missile production, for example, was being used in computers, aircraft and cars, originally civil technologies had begun to be used for military purposes. The international trade in many dual-use goods therefore grew

<sup>17</sup> All these nuclear weapons were either eliminated or withdrawn to Russia by the mid-1990s.

<sup>18</sup> Goldblat, J., *Can Nuclear Proliferation be Stopped?* (Geneva International Peace Research Institute: Geneva, 2007), p. 34.

<sup>19</sup> Goldblat (note 18).

simultaneously with the risk that they could be used for the development of WMD. However, the leaders of most European states seem to have considered the risk to be minimal until a number of export scandals in Germany and the Netherlands came to light in the 1990s and early 2000s.<sup>20</sup>

Although discussions of both disarmament and non-proliferation were prominent in the early post-cold war years, the discussion on non-proliferation soon came to dominate. The 1993 Chemical Weapons Convention (CWC) is considered a signal success in terms of its negotiation, as the states parties committed themselves to refrain from developing, producing, possessing or using an entire class of weapons and to destroy their existing stockpiles by specific deadlines. The CWC has also been reasonably successful in terms of compliance.<sup>21</sup> This could be due to the fact that the CWC includes the most developed and intrusive inspection and verification regime of all the multilateral arms control and disarmament agreements that are open to global membership.<sup>22</sup> The Organisation for the Prohibition of Chemical Weapons (OPCW) was established to verify states' implementation of the provisions of the CWC.<sup>23</sup> Much has been achieved since the CWC's entry into force, and states parties have proved more willing to implement the convention than are the parties to the 1968 Treaty on the Non-proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT).<sup>24</sup>

Under Article VII of the CWC, the states parties commit themselves to cooperate with each other and afford each other 'the

<sup>20</sup> Two of these cases are discussed in chapter 6, sections I and III, in this volume.

<sup>21</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) was opened for signature on 13 Jan. 1993 and entered into force on 29 Apr. 1997. As of Jan. 2009 there were 185 states parties to the CWC. The CWC is available at the website of the Organisation for the Prohibition of Chemical Weapons (OPCW), <<http://www.opcw.org/>>.

<sup>22</sup> Zanders et al., *Non-Compliance with the Chemical Weapons Convention: Lessons from and for Iraq*, SIPRI Policy Paper no. 5 (SIPRI: Stockholm, 2003), <<http://books.sipri.org/>>, p. 3.

<sup>23</sup> The OPCW is responsible for monitoring the national implementation of the CWC. Its inspectors monitor and verify the inactivation, and later destruction or conversion, of all declared chemical weapon production facilities, as well as the destruction of declared chemical weapons stockpiles.

<sup>24</sup> The NPT was opened for signature on 1 July 1968 and entered into force on 5 Mar. 1970. As of Jan. 2009 there were 190 states parties to the treaty. The NPT is available at <<http://www.un.org/events/npt2005/>>.

appropriate form of legal assistance' to facilitate national-level measures to fulfil their obligations under the convention, including having in place legal sanctions for offenders.<sup>25</sup> However, since the convention does not specify the forms of cooperation and legal assistance that may be required, the parties have to draw on existing international agreements regarding legal assistance and related domestic legislation or make ad hoc arrangements.<sup>26</sup>

The 1972 Biological and Toxin Weapons Convention (BTWC) was negotiated and adopted during the cold war. It prohibits the development, production, stockpiling, acquisition and retention of microbial or other biological agents or toxins in types and in quantities that have no justification for peaceful purposes.<sup>27</sup> It also bans weapons, equipment and means of delivery designed for the purpose of using such agents or toxins for hostile purposes or in armed conflict and bans all use of biological weapons. The BTWC is often criticized for not providing for implementation, verification or enforcement measures.<sup>28</sup>

The Non-Proliferation Treaty has three 'pillars': non-proliferation of nuclear weapons, nuclear disarmament and the peaceful use of nuclear energy. The treaty defines a nuclear weapon state as one that exploded a nuclear explosive device before 1967. All other states—whether parties to the treaty or not—are non-nuclear weapon states.<sup>29</sup> The essence of the non-proliferation pillar of the NPT is that the five nuclear weapon states—China, France, Russia, the UK and the USA—agree that they will not transfer 'nuclear weapons or other nuclear explosive devices' to any non-nuclear weapon state and will 'not in any way to assist, encourage, or

<sup>25</sup> Chemical Weapons Convention (note 21), Article VII(2).

<sup>26</sup> Yepes-Enriques, R. and Tabassi, L. (eds), *Organisation for the Prohibition of Chemical Weapons, Treaty Enforcement and International Cooperation in Criminal Matters: With Special Reference to the Chemical Weapons Convention* (T. M. C. Asser Press: The Hague, 2002), pp. 22–23

<sup>27</sup> The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological and Toxin Weapons Convention), was opened for signature on 10 Apr. 1972 and entered into force on 26 Mar. 1975. As of Jan. 2008 there were 159 states parties to the BTWC. The convention is available at <<http://www.opbw.org/>>.

<sup>28</sup> See e.g. Sims, N. A., 'The regime of compliance: the addition of confidence-building measures', *The Evolution of Biological Disarmament*, SIPRI Chemical & Biological Warfare Studies no. 19 (Oxford University Press: Oxford, 2001), pp. 61–81.

<sup>29</sup> Only 4 states are not parties to the NPT: India, Israel, North Korea and Pakistan.

induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons ...<sup>30</sup> Similarly, the non-nuclear weapon states parties agree not to receive, manufacture or acquire nuclear weapons or 'seek or receive any assistance in the manufacture of nuclear weapons'.<sup>31</sup> They also agree to conclude safeguards agreements with the International Atomic Energy Agency (IAEA) to verify that they are not diverting nuclear technology for use in nuclear weapons or other nuclear explosive devices.<sup>32</sup>

The apparent unwillingness of the nuclear weapon states to fulfil their disarmament commitments under the NPT has been cited by some non-nuclear weapon states as a justification for developing their own nuclear weapons.<sup>33</sup> From this perspective, the failure of the NPT's disarmament pillar could be seen as undermining the non-proliferation pillar. The most recent of the five-yearly review conferences for the NPT, held in 2005, gave little encouragement to those who seek to promote the aims of the treaty.<sup>34</sup> Most of the conference was occupied with disputes over procedural matters, and the ensuing negotiations reflected deep divisions, particularly between the nuclear weapons states and the non-nuclear weapon states, over priorities for the treaty regime and an apparent lack of willingness of some of the parties to abide by and extend their commitments. However, previous review conferences have been more successful.

While the 2005 Protocol to the 1988 United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) does not belong to the core non-proliferation agreements, it is nevertheless relevant for a scenario in which

<sup>30</sup> Non-Proliferation Treaty (note 24), Article I.

<sup>31</sup> Non-Proliferation Treaty (note 24), Article II.

<sup>32</sup> Non-Proliferation Treaty (note 24), Article III. For the list of states that had concluded NPT safeguards agreements with the IAEA as of 1 Jan. 2008 see Bodell, N., 'Arms control and disarmament agreements', *SIPRI Yearbook 2008* (note 1), pp. 523–25. On states' safeguards agreements with the IAEA see IAEA, 'IAEA safeguards overview: comprehensive safeguards agreements and additional protocols', <[http://www.iaea.org/Publications/Factsheets/English/sg\\_overview.html](http://www.iaea.org/Publications/Factsheets/English/sg_overview.html)>.

<sup>33</sup> Under Article VI of the NPT the nuclear weapon states parties have committed themselves 'to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control'.

<sup>34</sup> On the 2005 review conference see Kile, S. N., 'Nuclear arms control and non-proliferation', *SIPRI Yearbook 2006* (note 8), pp. 608–18.

a member state fails to control dual-use goods that are later found on a ship heading for a sensitive destination.<sup>35</sup> The SUA builds on the principle that no one committing unlawful acts against the safety of navigation will be given shelter in any state party but will be either prosecuted there or extradited to a state where they will stand trial. The protocol broadens the list of offences under the SUA to cover anyone who “transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of an NBC weapon, with the intention that it will be used for such purpose”.<sup>36</sup>

Some states have begun to develop new strategies to supplement the legally binding international non-proliferation agreements. The most illustrative example is perhaps the US-led 2003 Proliferation Security Initiative (PSI), which focuses on building capacities and cooperation for the interception (‘interdiction’) of illicit transfers of proliferation-sensitive items.<sup>37</sup> It does so by, among other things, organizing joint interdiction training exercises. The PSI also encourages participating states to use law enforcement and criminal justice procedures to tackle trafficking in proliferation-sensitive items.

## II. UN Security Council Resolution 1540

Since the end of the cold war, international terrorism has replaced the nuclear arms race between the two opposing blocs as the most urgent focus of states’ security concerns. One of the first incidents to alert the international community, particularly Western countries, to the international terrorist threat occurred in 1998, when the US embassies in Kenya and Tanzania were attacked. Many of

<sup>35</sup> The Protocol to the United Nations Suppression of Unlawful Acts against the Safety Maritime Navigation Convention (SUA Protocol) was signed on 1 Nov. 2005. The protocol is available at <<http://www.imo.org/>>. On the term ‘sensitive destination’ see the glossary in this volume.

<sup>36</sup> SUA Protocol (note 35), Article 3.

<sup>37</sup> The Proliferation Security Initiative was announced by US President George W. Bush on 31 May 2003. For a legal assessment of the PSI see Ahlström, C., ‘The Proliferation Security Initiative: international law aspects of the statement of interdiction principles’, *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005), pp. 741–67. On the term ‘proliferation-sensitive’ see the glossary in this volume.

the terrorist attacks of recent years have been carried out or inspired by the al-Qaeda network led by Osama bin Laden. Most experts believe that it is unlikely that terrorist groups will be able to acquire all the goods and materials needed to produce WMD.<sup>38</sup> Nevertheless, at least one terrorist attack has involved a WMD-class biological substance: the 1995 sarin gas attack on Tokyo's underground railway network carried out by Japanese terrorists. Since mid-1994, several countries have intercepted substantial quantities of plutonium and weapon-grade uranium, although in none of the cases has the confiscated amount been large enough for an industrially underdeveloped country or a terrorist group to manufacture a nuclear explosive device.<sup>39</sup>

UN Security Council Resolution 1540 was adopted in 2004 in response to growing concern among state officials about the risk of terrorists acquiring WMD. On the basis that WMD proliferation constitutes a threat to international peace and security, Resolution 1540 obligates all UN member states to take concerted action to prevent the acquisition of WMD by non-state actors. Resolution 1540 invokes Chapter VII of the UN Charter, which empowers the Security Council to place legal obligations on UN member states when it acts in response to a threat to international peace and security. The final language of Resolution 1540 was the outcome of extensive and lengthy negotiations, mainly among the five permanent members of the Security Council, reflecting the political sensitivity of the issues the resolution addresses.

Among the obligations imposed by Resolution 1540 is for states to establish adequate controls over WMD, the means to develop and deliver them, and related materials. Similar obligations are set out in the NPT, the CWC and the BTWC, but those treaties specifically relate to the spread of NBC weapons or materials to state actors.<sup>40</sup> The obligations under Resolution 1540 specifically address national legislation, going beyond merely stipulating that states must establish adequate controls. For example, operative paragraph 2 stipulates that states must adopt and enforce effective domestic legislation that prohibits any non-state actor from manufacturing, acquiring, possessing, developing, transferring or using

<sup>38</sup> See e.g. Goldblat (note 18).

<sup>39</sup> Goldblat (note 18).

<sup>40</sup> See section I above.

NBC weapons and their means of delivery, in particular for terrorist purposes. Operative paragraph 3 obligates states to develop and maintain ‘appropriate effective’ border controls and law enforcement measures to detect, deter, prevent and combat illicit trafficking and brokering in such items.<sup>41</sup> This should be done in accordance with states’ national legal authorities and legislation and with international law, using international cooperation when necessary. Operative paragraph 3(d) includes an obligation to establish and apply appropriate criminal or civil sanctions for violations of such export control laws and regulations. As noted above, the European Commission went further in 2006 by proposing that EU member states be obligated to adopt in their national legislation criminal sanctions for breaches of the export authorization requirement set out in Article 19 of the EC Dual-use Regulation.<sup>42</sup>

The following 10 key aspects of Resolution 1540 are directly relevant to the present report.

1. It prohibits states from supporting non-state actors’ efforts to acquire NBC weapons.
2. It obligates states to adopt national legislation to prohibit non-state entities from acquiring NBC weapons.
3. It obligates states to take and enforce effective measures to establish domestic controls to prevent NBC weapon proliferation, including controls on related materials.
4. It calls on states to report on their past and planned steps to implement the resolution.
5. It preserves existing treaty obligations.
6. It calls on states to maintain national control lists (i.e. lists of items subject to controls).
7. It invites states that can to assist others in implementing the resolution.
8. It calls on states to promote universal adoption and full implementation and strengthening of NBC-related treaties.
9. It calls on states to promote dialogue and cooperation on non-proliferation.

<sup>41</sup> On the term ‘broker’ see the glossary in this volume.

<sup>42</sup> As can be seen in the table in appendix A in this volume, most if not all EU member states already apply criminal sanctions for at least some export control violations.



10. It initiates cooperative action to prevent illicit trafficking in NBC materials and means of weapon delivery.<sup>43</sup>

Some legal scholars and state officials were quick to accuse the Security Council of acting outside its legal mandate (i.e. acting *ultra vires*) in invoking Chapter VII powers in Resolution 1540. These critics argue that Chapter VII powers may be exercised only in relation to a specific situation or dispute, whereas Resolution 1540 invokes them in relation to an abstract situation.<sup>44</sup> They claim the Security Council may only call on states to take responsibility for their controls to prevent exports of NBC weapons and their means of delivery—including dual-use goods—but may not obligate them to have penalties in force as stipulated in operative paragraph 3(d). Others acknowledge the possible trespass of legal competence but support Resolution 1540 as they believe the risk of terrorists acquiring WMD should be addressed by all available means.<sup>45</sup> Still others believe the Security Council acted within its legal mandate in adopting Resolution 1540 and the Security Council's Chapter VII powers are not limited to specific situations or disputes.<sup>46</sup> States seem more concerned about fulfilling the spirit of Resolution 1540 than they are about its legal basis.

In order to ensure that there is at least some monitoring of national implementation, Resolution 1540 obligates each member state to submit a report to the 1540 Committee on its progress in implementing the resolution.<sup>47</sup> This is as far as the UN can go due to its limited capacity to intervene in the national affairs of its

<sup>43</sup> This summary of the key elements of Resolution 1540 is taken from Datan, M., 'Security Council Resolution 1540: WMD and non-state trafficking', *Disarmament Diplomacy*, no. 79 (Apr./May 2005).

<sup>44</sup> See e.g. Ahlström, C., 'United Nations Security Council Resolution 1540: non-proliferation by means of international legislation', *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2007), p. 461; Dunworth, T., 'The new multilateralism?', Speech delivered at the National Consultative Committee on Disarmament Threats to Peace and Disarmament Convention in Wellington, New Zealand, on 13–14 May 2006; and Talmon, S., 'The Security Council as world legislature', *American Journal of International Law*, vol. 99, no. 1 (Jan. 2005), pp. 175–93.

<sup>45</sup> See e.g. Rosand, E., 'The Security Council as "global legislator": *ultra vires* or *ultra innovative*?', *Fordham International Law Journal*, vol. 28, no. 3 (Feb. 2005), p. 542.

<sup>46</sup> See e.g. Wood, M., 'The UN Security Council and international law', Hersch Lecture delivered at the Lauterpacht Centre for International Law, University of Cambridge, 7–9 Nov. 2006, <[http://www.lcil.cam.ac.uk/lectures/2006\\_sir\\_michael\\_wood.php](http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php)>.

<sup>47</sup> On the 1540 Committee see note 6.

members. However, the committee has developed tools to make the best use of the national reports—for example a matrix to facilitate the analysis of the reports.<sup>48</sup>

The reporting system has, among other things, brought to light differences between law enforcement systems in UN member states. Since the 1540 Committee is mandated only to assess and collate the national reports, not to verify the information they contain, it is difficult for it to draw definitive conclusions from them. Perhaps the most useful function of the reporting system, therefore, is to alert the committee to possible non-compliance when national reports are incomplete or absent.

Since the 11 September 2001 attacks on the USA, the UN member states have agreed on several other innovative measures. In September 2006 they adopted the UN Global Counter-terrorism Strategy.<sup>49</sup> This was the first time that all UN member states had agreed to a common strategic approach to combating terrorism, reflecting the high priority given to counterterrorism. The adoption of the strategy could also be an indication that the member states are open to innovative solutions to this emerging threat.

### III. The multilateral export control regimes

There are four principal multilateral regimes in which participating states coordinate their national policies on export controls: the Australia Group, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG) and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies. The decisions and control mechanisms of these regimes are not legally binding on the participants. It is often argued that this fact could make states more open to discussing sensitive issues in these forums than they are at inter-

<sup>48</sup> UN Security Council, Report of the Committee established pursuant to Resolution 1540 (2004), S/2006/257, 25 Apr. 2006, p. 7. The EU, although not a member of the UN, submitted a report to the 1540 Committee in 2004 during the Dutch EU Presidency. European Union report on the implementation of the UNSCR 1540, Oct. 2004, <<http://trade.ec.europa.eu/doclib/>>.

<sup>49</sup> The Global Counter-terrorism Strategy was adopted in UN General Assembly Resolution 60/288, 20 Sep. 2006. For this and other UN General Assembly resolutions see <<http://www.un.org/documents/resga.htm>>.

national non-proliferation treaty review conferences, for example. The informality of these regimes is also believed to make them more flexible and responsive and to encourage greater confidence between the participants than is the case with international agreements.<sup>50</sup> In this way, the multilateral export control regimes supplement the function of international agreements, in which the difficulty of crafting legal commitments can make for long and complicated negotiations.

The Australia Group, established in 1985, is an informal group of countries that are committed to combating the proliferation of chemical and biological weapons. All of them are suppliers and trans-shippers of chemicals, biological agents and production equipment that could be used in chemical or biological weapon programmes. The Australia Group's common control lists cover dual-use chemical manufacturing facilities, equipment and related technology; dual-use biological equipment; chemical weapon precursors; biological agents; and plant pathogens.<sup>51</sup>

States participating in the Missile Technology Control Regime, which was established in 1987, share the goals of non-proliferation of unmanned delivery systems for WMD and seek to coordinate national export licensing efforts aimed at preventing WMD proliferation. The participating states have agreed to place national controls on items contained in the Equipment, Software and Technology Annex to the MTCR Guidelines. While the participating states make their own export licensing decisions at the national level, they commit themselves to take the agreed MTCR Guidelines into account. In 2002 the MTCR participating states modified the guidelines to reflect their current thinking about how export controls could help to counter terrorism.<sup>52</sup>

The Nuclear Suppliers Group comprises nuclear supplier states that seek to contribute to the non-proliferation of nuclear weapons through the implementation of two sets of guidelines for nuclear and nuclear-related exports. Although it was formed in 1975, the

<sup>50</sup> See Ahlström, C., *Status of Multilateral Export Control Regimes: An Examination of Legal and Non-legal Agreements in International Co-operation* (Iustus Förlag: Uppsala, 1999).

<sup>51</sup> For the objectives and documents of the Australia Group see <<http://www.australiagroup.net/en/index.html>>.

<sup>52</sup> For the objectives and documents of the MTCR, including the MTCR Guidelines, see <<http://www.mtc.info/english/index.html>>.

NSG was inactive for an extended period until the end of the cold war. Nuclear supplier states recognized in 1990 that the nuclear non-proliferation regime was threatened by activities such as those of Iraq, which carried out a covert and illegal nuclear weapon programme based on imported technologies that were not subject to export controls.<sup>53</sup> In 1992 the NSG extended its controls to nuclear-related dual-use items and strengthened information sharing and coordination among the national export control authorities. A full-scope safeguards agreement with the IAEA was made a condition for the future supply of so-called trigger-list items to any non-nuclear weapon state by an NSG participating state.<sup>54</sup> Like the MTCR, the NSG agreed to strengthen its guidelines in 2002 in order to counter the threat of the diversion of nuclear exports to terrorists.

The Wassenaar Arrangement was established in 1995. Its aim is to promote greater transparency and responsibility with regard to transfers of armaments and dual-use goods and technologies. One of the original objectives of the Wassenaar Arrangement was to prevent a state acquiring armaments and sensitive dual-use items for military end-use if its behaviour became a serious concern. However, activities under the arrangement are not directed against any identified state or group of states. In December 2001 the participating states extended the scope of controls to cover non-state actors.<sup>55</sup>

Another entity that deserves mention in this context is the Zangger Committee, also known as the NPT Exporters Committee. It was established in 1974 after a series of informal meetings on the

<sup>53</sup> For the objectives and documents of the NSG, including the Guidelines on Nuclear Transfers (INFCIRC/254, part 1) and the Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology (INFCIRC/254, part 2), see <<http://www.nuclearsuppliersgroup.org/>>. See also Anthony, I., Ahlström, C. and Fedchenko, V., *Reforming Nuclear Export Controls: The Future of the Nuclear Suppliers Group*, SIPRI Research Report no. 22 (Oxford University Press: Oxford, 2007).

<sup>54</sup> Full-scope safeguards are mandatory safeguards that are applied to all nuclear materials in all peaceful nuclear activities within a country's territory or under its control. All non-nuclear weapon states parties to the NPT are under full-scope safeguards. See International Atomic Energy Agency, 'The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-proliferation of Nuclear Weapons', INFCIRC/153 (corrected), June 1972. For this and other IAEA 'information circulars' see <<http://www.iaea.org/Publications/Documents/Infcircs/>>.

<sup>55</sup> For the objectives and documents of the Wassenaar Arrangement see <<http://www.wassenaar.org/>>.

interpretation of Article III, paragraph 2 of the NPT, which concerns the peaceful use of nuclear materials and equipment. The aim of the Zangger Committee is to offer guidance on interpretation of the paragraph to all parties to the treaty.<sup>56</sup>

The four regimes and the Zangger Committee conduct activities to emphasize to non-participating states the importance of instituting modern and effective export controls. These activities, along with increased transparency, are meant to convince these states to apply the guidelines, control lists, standards and procedures that have been developed by participants in the various regimes.

#### IV. European Union non-proliferation policy

The WMD non-proliferation policy of the EU should be seen in the broader context of the EC common commercial trade policy. Given the fact that the EU single market today constitutes one of the world's largest exporters, the European Commission is faced with a challenging task in balancing trade facilitation (promoting the export of EU-produced goods) against the security concerns that some exports could raise. The competence to legislate in such a sensitive area is shared among several EU institutions. To add to the difficulty of the Commission's role, all decisions relating to the EU's Common Foreign and Security Policy (CFSP) are negotiated by the Council of the European Union. In that body, consensus must be reached among participating EU heads of state and government and foreign ministers.<sup>57</sup> The Commission is involved in many activities under the CFSP, including representing the EU in international settings, but it lacks the exclusive competence to propose legislation that it enjoys in the Community pillar.<sup>58</sup>

The evolution of EU non-proliferation activities can be judged a success when measured by the number of political declarations, joint actions, common positions and strategies adopted is any indi-

<sup>56</sup> For more information on the Zangger Committee see <<http://www.zanggercommittee.org/>>.

<sup>57</sup> The Council of the European Union (also referred to as the EU Council, the Council of Ministers or simply the Council) is the EU's main decision-making body. For more information see the glossary in this volume. On the types of legal act available to the Council in the CFSP framework see chapter 3, section I, in this volume.

<sup>58</sup> On the CFSP see chapter 3, section II, in this volume.

cation. In particular, a great deal was accomplished by the EU in 2003 in the area of WMD non-proliferation. In June of that year, a set of basic principles ‘defining the broad lines for an EU strategy against proliferation of WMD’ was agreed. These included a plan for implementing the principles (the WMD Action Plan).<sup>59</sup> In December 2003, the European Security Strategy (ESS) and the EU Strategy against Proliferation of Weapons of Mass Destruction (EU WMD Strategy) were adopted simultaneously.<sup>60</sup> Both of these documents address the risk that terrorist groups may acquire WMD. The EU WMD Strategy is regarded as a useful model for non-EU states and regional organizations around the world that are considering engaging in cooperation on issues related to WMD non-proliferation. Together with the Basic Principles, these documents could be seen as constituting the basis for current EU non-proliferation policy.

The ESS—which was drafted by the Office of Javier Solana, the EU High Representative for the CFSP—addresses three threats as matters of the highest priority: terrorism, failed states and organized crime, and the proliferation of WMD.<sup>61</sup> The text was approved by the European Council but has never been adopted using any of the legal acts available to the Council of the European Union under Title V of the Treaty on European Union (TEU) to define the principles and general guidelines of the CFSP. Thus, the ESS is a *sui generis* document and not legally binding on the member states.

<sup>59</sup> Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction was adopted by the General Affairs and External Relations Council on 16 June 2003. The document is available at <[http://ue.eu.int/ueDocs/cms\\_Data/docs/pressdata/en/reports/76328.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/76328.pdf)>.

<sup>60</sup> European Council, ‘A secure Europe in a better world: European Security Strategy’, Brussels, 12 Dec. 2003, <[http://www.consilium.europa.eu/cms3\\_fo/showPage.ASP?id=266](http://www.consilium.europa.eu/cms3_fo/showPage.ASP?id=266)>. See also Portela, C., ‘The EU and the NPT: testing the new European nonproliferation strategy’, *Disarmament Diplomacy*, no. 78 (July/Aug. 2004). Council of the European Union, ‘Fight against the proliferation of weapons of mass destruction: EU Strategy against Proliferation of Weapons of Mass Destruction’, 15708/03, Brussels, 10 Dec. 2003, adopted by the European Council on 12 Dec. 2003 and available at <[http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?id=718](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=718)>.

<sup>61</sup> See e.g. Bailes, A. J. K., *The European Security Strategy: An Evolutionary History*, SIPRI Policy Paper no.10 (SIPRI: Stockholm, Feb. 2005), <<http://books.sipri.org/>>; Biscop, S., *The European Security Strategy: Implementing a Distinctive Approach to Security*, Royal Institute for International Relations Sécurité & Stratégie, Paper no. 82 (Royal Institute for International Relations: Brussels, Mar. 2004); and Leonard, M. and Gowan, R., *Implementing the European Security Strategy* (Global Europe in association with the British Council: Brussels, 2004).

However, it requires constant revision and updating as well as regular progress reports.<sup>62</sup>

The WMD Action Plan groups the measures to be undertaken by the EU in two categories. The first category contains measures for immediate action and the second those to be implemented over a longer period. For each of the seven measures identified for immediate action, the action plan includes a time frame, the specific actions to be taken and projected costs. Hence, the plan focuses on practical implementation of the more general objectives of the European Security and WMD strategies. Largely building on the discussions that led up to the adoption of the WMD Strategy, the action plan includes the establishment of a monitoring centre to collect information and intelligence relevant to implementation of the WMD Strategy and a biannual review of implementation by the EU General Affairs and External Relations Council (GAERC).<sup>63</sup>

In December 2008 GAERC adopted a new document containing new 'lines for action' on WMD non-proliferation in response to a perceived increase in the threat posed by WMD proliferation since 2003.<sup>64</sup> Among other things the document calls for raising the profile of non-proliferation measures and improving and intensifying cooperation in measures to obstruct illegal transfers and trafficking networks, both in the EU and with third countries. It also proposes strengthening 'legal means to combat acts of proliferation' and agreement at the EU level that 'criminal sanctions are appropriate penalties for illegal exports, brokerage and smuggling of weapons and materials of mass destruction'. Finally, it calls for national reviews and a comparative study of non-proliferation measures, practices and legislation in the EU member states.

The EU now deals with non-proliferation of WMD at three levels. First, it maintains a political dialogue with third countries in

<sup>62</sup> Portela (note 60). The European Council (also known as the European Summit) is a meeting of the heads of state or government of the member states that is held c. 4 times a year. It should not be confused with the EU Council (see note 57). For more information on the European Council see the glossary in this volume.

<sup>63</sup> The GAERC is a meeting of the Council that considers external relations and general policy. It is attended by the foreign ministers of the member states. For the biannual progress reports on the implementation of the EU WMD Strategy see <[http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?id=718](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=718)>.

<sup>64</sup> Council of the European Union, Council Conclusions and 'New lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems', 17172/08, 17 Dec. 2008.

which the issue is frequently raised and the EU standpoint presented. In November 2003, only a month before it adopted the WMD Strategy, the EU decided on a new policy for managing non-proliferation in the context of its relationships with third countries. This included the requirement that a ‘non-proliferation clause’ should be included in future EU agreements with third countries.<sup>65</sup> The language of this clause includes a commitment by the third country to join, ratify, implement and comply with relevant international legal instruments that seek to counter the proliferation of WMD as well as a commitment to establish an effective system of national export controls that apply to both the export and the transit of WMD-related goods. At the time of writing, non-proliferation clauses have been included in EU partnership and association agreements with more than 90 states.<sup>66</sup> Further negotiations are under way with China (although these are at a very early stage), South Africa and Ukraine.<sup>67</sup> With some countries, the EU has found it necessary to compromise and include only the essential elements of its standard WMD clause.

The second level at which the EU addresses proliferation risks is activities under the EU’s Community pillar.<sup>68</sup> This is done through the safeguards systems that are implemented within the EU as well as through the commitments of the member states in the export control and non-proliferation regimes.<sup>69</sup> Safeguards systems are centred around harmonized lists of dual-use goods for the export of which licences and adherence to other common rules are required. The European Commission participates independently in the Australia Group and has observer status in the Zangger Committee and the NSG. The Council decides on specific regulations—

<sup>65</sup> Council of the European Union, Note from the General Secretariat, 14997/03, 19 Nov. 2003. The agreed text of the clause is included as an attachment to annex I of this document.

<sup>66</sup> EU association agreements are negotiated between the EU and non-EU member states for the purpose of creating a framework for cooperation, usually with political, trade, social, cultural or security links. For the current agreements see the Council’s database at <[http://www.consilium.europa.eu/cms3\\_applications/Applications/accords/search.asp](http://www.consilium.europa.eu/cms3_applications/Applications/accords/search.asp)>.

<sup>67</sup> See Council of the European Union, General Secretariat, Six-monthly Progress Report on the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (2007/II), 16411/07, 11 Dec. 2007, p. 14.

<sup>68</sup> On the EU pillar structure see chapter 3 in this volume.

<sup>69</sup> On the major multilateral export control regimes see section III above.



of which the EC Dual-use Regulation is not the least important in this context—making it an essential body in the development of EU non-proliferation policy. Even so, it is possible that the trade ministers of the EU do not give adequate consideration to security issues or may be too protectionist in dealing with trade issues.

The third level is the design and implementation of assistance programmes in third countries. Since 2004 the EU has run an assistance programme to build capacities in the control of dual-use exports. The first pilot project in this area was implemented by SIPRI. Follow-on projects have been implemented by the German Federal Office of Economics and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA).<sup>70</sup> Countries including China, Georgia, Morocco, Tunisia, Ukraine, the United Arab Emirates and six western Balkan states currently benefit. The EU also has assistance programmes in the nuclear field, especially to build capacities for detecting and responding to nuclear trafficking.<sup>71</sup>

The EU took several steps to enhance its non-proliferation policy in the early 2000s quickly, given the character of the policies and the complexity of the decisions involved. The ESS and the WMD Strategy aimed to launch a new system for the EU's external security activities. Nevertheless, the EU's institutional framework suffers from the lack of some legal competences required for effective enforcement of its non-proliferation goals.<sup>72</sup> For example, the EU cannot intervene in areas relating to member states' national systems for law enforcement, so some non-proliferation policies may be implemented with varying success. In addition, there is a lack of coherence between the EU's non-proliferation objectives on the one hand and trade objectives on the other.

In a December 2006 concept paper, the Council called for EU institutions and member states to 'further improve synergies' in

<sup>70</sup> See Stockholm International Peace Research Institute, 'EU pilot project conference materials', <<http://www.sipri.org/contents/expcon/euppconfmaterials.html>>; and Federal Office of Economics and Export Control, 'EU-outreach projects on export controls', <<http://www.eu-outreach.info>>. On the contribution of the Commission in the area of non-proliferation see the bi-annual progress reports on the implementation of the EU WMD Strategy (note 60).

<sup>71</sup> Council Joint Action 2005/574/CFSP of 18 July 2005 on support for IAEA activities in the areas of nuclear security and verification, *Official Journal of the European Union*, L 193, 23 July 2005, pp. 44–50.

<sup>72</sup> See also chapter 3 in this volume.

many areas, including WMD non-proliferation.<sup>73</sup> One initiative proposed for the short or medium term was the establishment of the EU WMD Monitoring Centre (WMD-MC). The concept paper suggests that such a centre could enhance effectiveness without modifying constitutional settings and prerogatives by establishing a new working method for cooperation between the Council Secretariat, the High Representative for the CSFP, the Commission services and the member states. The WMD-MC opened in 2007.<sup>74</sup> It holds regular meetings on thematic issues and for information exchange. Adoption of the Treaty of Lisbon, which was signed by the EU member states in 2007, could also enhance CFSP cooperation, including in WMD non-proliferation, by merging the current positions of High Representative for the CSFP and Commissioner for External Relations.<sup>75</sup> A similar proposal appeared in the now-defunct EU Constitutional Treaty.<sup>76</sup>

<sup>73</sup> Council of the European Union, 'EU Strategy against the Proliferation of WMD: monitoring and enhancing consistent implementation', Concept paper endorsed by the General Affairs and External Relations Council, Brussels, 16694/06, 12 Dec. 2006.

<sup>74</sup> Council of the European Union, Six-monthly progress report on the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (2007/I), 11024/07, Brussels, 19 June 2007, pp. 21–22.

<sup>75</sup> The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed at Lisbon on 13 Dec. 2007, *Official Journal of the European Union*, C 306, 17 Dec. 2007. References to the Lisbon Treaty hereafter are to the most recent consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU, replacing the Treaty establishing the European Community, TEC), *Official Journal of the European Union*, C 115, 9 May 2008. Where the Lisbon Treaty would change the number of a TEC or TEU article, the original article number is given in parentheses. On the Lisbon Treaty and the evolution of the TEC and the TEU see the glossary and chapter 3, section IV, in this volume.

<sup>76</sup> The Treaty establishing a Constitution for Europe (Constitutional Treaty) was signed at Rome on 29 Oct. 2004, *Official Journal of the European Union*, C 310, 16 Dec. 2004.

### 3. The European Union institutional framework

In a letter that was sent to the President of the European Commission soon after the 11 September 2001 terrorist attacks on the United States, the US Mission to the EU presented a list of proposals for EU–US counterterrorism cooperation. One of these was for the EU to ‘authorize and encourage police authorities and local magistrates of member and accession states to deal directly with US law enforcement authorities’. Another was for the EU to ‘mandate EU extradition of nationals for terrorist offences and urge member and accession states to remove remaining “political offense” defenses to extradition in terrorism cases’.<sup>77</sup> The language used in these proposals illustrates a common misconception, held even by high-level officials, that the EU is a sovereign institution with powers to ‘authorize’ and ‘mandate’ its member states in areas related to judicial cooperation. The reality of decision making and legal competences in the EU is far more complicated. This chapter attempts to explain the EU’s current institutional framework and, in section III, how this framework is reflected in the EU export control regime for dual-use goods.

#### I. The three areas of competence

##### **Origins and foundations of the pillar structure<sup>78</sup>**

The principal features of the EU’s current structure are three pillars, which define the different sets of rules that govern EU cooperation: (a) the Community pillar, (b) the CFSP pillar and (c) the Police and Judicial Cooperation in Criminal Matters

<sup>77</sup> Foster, J. J., Deputy Chief of Mission, Letter to Romano Prodi, President of the Commission of the European Communities, Brussels, 16 Oct. 2001, <<http://www.statewatch.org/news/2001/novAksalet.htm>> (emphasis added).

<sup>78</sup> Currently, the areas of competences are split between the European Community (the first pillar) and the EU (the second and third pillars). As discussed below, this formal structure is likely to change in the next few years, with all competences coming under the EU. Nevertheless, the three-pillar model is still a useful basis for presenting the institutional framework of the EU as there will still be a division of competences.

(PJCC) pillar.<sup>79</sup> This structure was first introduced with the adoption of the 1992 Treaty of Maastricht (Treaty on European Union, TEU).<sup>80</sup> The first pillar comprises the European Communities: the European Community (formerly known as the European Economic Community, EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). The ECSC ceased to exist in 2002.<sup>81</sup> The legal foundation of the European Communities is currently provided by the 1957 Treaty establishing the European Community (TEC) and the 1957 Treaty establishing the European Atomic Energy Community.<sup>82</sup> In the second and third pillars the TEU created new competences for the member states to take joint action and cooperate in the fields of foreign relations and internal affairs.

The 2007 Lisbon Treaty would abolish the pillar structure, with the result that the European Community would cease to exist and all future activities would be conducted by the EU instead.<sup>83</sup> This change is expected to occur whatever the outcome for the Lisbon Treaty. Even so, the principle of shared competences between the EU institutions and the member states will continue to govern its institutions, even though certain areas will be made subject to the

<sup>79</sup> Although the second pillar also governs the European Security and Defence Policy, it will be referred to in this study as the CFSP pillar for the sake of brevity. The third pillar originally governed a larger range of issues and was called Justice and Home Affairs.

<sup>80</sup> The Treaty on European Union was signed at Maastricht on 7 Feb. 1992 and entered into force on 1 Nov. 1993, *Official Journal of the European Communities*, C 191, 29 July 1992. The CFSP is established under Title V of the treaty. Unless otherwise indicated, references hereafter are to the most recent consolidated version of the TEU as amended by the Treaty of Nice, signed at Nice on 26 Feb. 2001 and entered into force on 1 Feb. 2003, *Official Journal of the European Communities*, C 325, 24 Dec. 2002. Where the number of an article has changed, the original article number is given in parentheses. On the evolution of the TEU see the glossary in this volume.

<sup>81</sup> The Treaty Establishing the European Coal and Steel Community, signed on 18 Apr. 1951, entered into force on 24 July 1952 and expired on 23 July 2002.

<sup>82</sup> The Treaty establishing the European Economic Community (Treaty of Rome) and the Treaty establishing the European Atomic Energy Community (Euratom Treaty) were both signed at Rome on 25 Mar. 1957 and entered into force on 1 Jan. 1958. From 1967, the institutional structures of the ECSC and Euratom were merged with those of the EEC. The amended Treaty of Rome is now called the Treaty establishing the European Community. References to the TEC hereafter are to the most recent consolidated version, as amended by the Treaty of Nice (see note 80). Where the article number has changed, the original article number is given in parentheses. On the TEC see the glossary in this volume.

<sup>83</sup> On the Lisbon Treaty see note 75 and section IV below.

current first pillar decision-making framework. If any EU cooperation will change with the formal removal of the pillar structure, it will be that currently in the third pillar: police and judicial cooperation in the area of criminal justice.

### **Decision making in the three areas of competence**

The principal differences between what is currently the first pillar and what are currently the second and third pillars relate to the procedures for taking decisions and the competences of the different institutions—the Council of the European Union, the European Commission and the European Parliament. The Parliament and the Council together form the EU's highest legislative body in the Community pillar, and share the competence to adopt supranational legislation. In sensitive matters, which include commercial policy and dual-use export controls, the Parliament is given only a consultative role. As an executive body, the Commission implements adopted legislation. It can also propose legislation and has a range of other competences and responsibilities that are discussed below. The Commission and the Parliament have few competences related to proposing new legislation and decision-making in the CFSP and PJCC pillars—in these areas legislation is proposed and decisions adopted by the member states through the Council. Nevertheless, the Commission is an important actor in defining policy in all three pillars.

As decisions in the second and third pillars are adopted by the member states, they do not have the force of European Community law but rather of international law. Against this background the first pillar—embracing EC law and applying to the Economic and Monetary Union (EMU), citizenship and several other EU competences—could be described as forming a unique system of supranational governance, while the other two pillars are of an inter-governmental character.<sup>84</sup>

Council decisions in the Community-pillar must in most cases be passed by a qualified majority vote (QMV).<sup>85</sup> The QMV system is designed to balance voting power in the Council in line with the

<sup>84</sup> On the term 'supranational' see the glossary in this volume.

<sup>85</sup> The QMV procedures are laid down in the Treaty establishing the European Community (note 82), Article 205(2).

member states' populations and is based on the principle of double majority.<sup>86</sup> It is not applied to some sensitive Community issues, such as tax and social policy, where decisions require unanimity among all Council members.<sup>87</sup> A modified version of the QMV system is likely to be used by the EU more generally in the future, even in areas that are currently outside the first pillar. Unanimity in the Council is also required for Council decisions taken in the CFSP and PJCC pillars, with a few exceptions.

The European Court of Justice (ECJ) acts as the guardian of supranational Community legislation, adjudicating in cases where member states are accused of not properly implementing Community law.<sup>88</sup> The second pillar is expressly outside the jurisdiction of the ECJ.<sup>89</sup> Nevertheless, the ECJ and its Court of First Instance have the competence to adjudicate legal disputes between member states and between the member states and the European institutions on issues linked to the interpretation of the EU treaties, including those related to the third pillar.

### Legal acts available in the three areas of competence

Different types of legal act are available in each of the three areas of competence. The legal acts available in the Community framework are regulations, directives and decisions.<sup>90</sup> A *regulation* has direct applicability in all the EU member states, starting from the date on which it enters into force. A Council regulation can be referred to in a national court in the event that its provisions are violated. The purpose of a *directive* is to harmonize the national legislation of member states in areas related to EC law, for example

<sup>86</sup> Adoption of a Council decision by QMV currently requires at least 255 votes out of a possible 345 with a majority of the member states represented. Each member state has a fixed number of votes. These numbers are determined by the size of its population but are progressively weighted in favour of the smaller member states. If the Lisbon Treaty comes into force, decisions will require the support of 55% of the member states and 65% of the EU's population. A further balance is provided by the requirement that at least 4 member states must oppose a decision in order to block it; otherwise the QMV is deemed to have been reached even if the population criterion is not met. See Treaty of Lisbon (note 75), Article 238(3)(a), TFEU.

<sup>87</sup> Treaty establishing the European Community (note 82), articles 93 and 137(2)(b) (ex articles 99 and 118).

<sup>88</sup> On the role of the ECJ see section II below.

<sup>89</sup> Treaty on European Union (note 80), Article 46 (ex Article 56).

<sup>90</sup> Treaty establishing the European Community (note 82), Article 249 (ex Article 189).

to enhance coherence in the social rights of EU citizens. A directive prescribes the goals to be achieved but leaves it to the member states to decide on the appropriate measures for reaching them. A directive has ‘direct effect’ in member states and can be referred to in a national court.<sup>91</sup> *Decisions* apply directly to the parties they address—they have individual applicability—in contrast to regulations and directives. Importantly, member states are obligated to take all appropriate measures at national level to fulfil their obligations under EC legislation—and national provisions must never jeopardize the attainment of the objectives of the TEC as a whole.<sup>92</sup> As regards Council regulations, member states must in some cases supplement them with adequate sanctions in the national legislation in order to comply with the requirement to ensure the effectiveness of EU legislation.

In matters relating to the CFSP (and the European Security and Defence Policy, ESDP), the Council may adopt common positions and joint actions. *Common positions* are intended to harmonize positions on issues related to foreign and security policy where consensus can be reached. An EU decision to impose sanctions targeting a third country or a non-state actor would usually be based on a common position, following a Council decision.<sup>93</sup> However, common positions have only a declaratory function and need to be implemented at the national level. *Joint actions* are adopted whenever member states agree to carry out joint operations, for example in order to provide assistance to a third country. Joint actions are thus more operational than common positions.

<sup>91</sup> Direct effect exists in 2 forms: vertical and horizontal direct effect. See section II below.

<sup>92</sup> This principle is found in Treaty establishing the European Community (note 82), Article 10 (ex Article 5) and is commonly referred to as the principle of loyalty.

<sup>93</sup> If the sanctions called for in a common position impinge on Community matters, a Council regulation must also be adopted—by QMV, if it involves economic or financial sanctions against a state and by consensus with prior consultation of the European Parliament if it targets a non-state actor. Examples of sanctions under the CFSP include Council Common Position 2007/140/CFSP of 27 Feb. 2007, concerning restrictive measures against Iran, *Official Journal of the European Union*, L 61, 28 Feb. 2007, p. 49–55; and Council Common Position 2002/402/CFSP of May 2002 concerning restrictive measures against Usama bin Laden and others, *Official Journal of the European Communities*, L 139, 29 May 2002, pp. 4–5. For the most recent amended versions of these positions see <[http://ec.europa.eu/external\\_relations/cfsp/sanctions/measures.htm](http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm)>.

The legal acts available to the Council in the area of police and judicial cooperation in criminal matters include common positions, framework decisions, decisions and conventions. *Common positions* define the approach of the Union in a particular matter. *Framework decisions* are meant to harmonize the penal or other laws of the member states, for example by defining and suggesting criminal penalties for a serious offence. They are binding as to the result to be achieved but member states decide on appropriate measures to be taken. Framework decisions are thus similar in character to the directives available to the Council under the Community pillar. *Decisions* are adopted to give effect to third-pillar policies that do not relate to the harmonization of national legislation. Finally, *EU conventions* are, like all other conventions, strictly intergovernmental and need to be ratified by the member states in order to enter into force.

## II. Cooperation in the three areas of competence

### European Community

Although European cooperation has at times been expected to develop into the creation of a federal union, supranational cooperation is currently carried out only on issues related to economic, social and environmental policy.<sup>94</sup>

The extent of supranational cooperation in the Community pillar is illustrated by the principles of supremacy and the role of the ECJ in the enforcement of EC law, through either Article 234 of the TEC or ‘direct effect’. TEC Article 234 ensures that national courts are liable for guaranteeing proper interpretation of Community law by providing that ‘they shall ask the ECJ to give a preliminary ruling on the interpretation of the treaty and the validity and interpretation of acts of the Community institutions’.<sup>95</sup> Hence, if a

<sup>94</sup> The language of the Lisbon Treaty should guarantee that the Union will never become a centralized ‘superstate’—e.g. the treaty lays down the obligation to ‘respect’ the national identities of the member states ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. Council of the European Union, Presidency Conclusions, 11177/1/07 rev. 1, Brussels, 20 July 2007, p. 25.

<sup>95</sup> Treaty establishing the European Community (note 82). In some cases the national courts must ask the ECJ for its opinion. This has been established in 2 ECJ rulings that concern state liability and the function of national courts: Case C-224/01, *Köbler*,



member state, acting through its judicial authorities, fails to enforce Community law, the case should be referred to the ECJ. This article has been described as one of the most successful articles of the TEC because it creates ‘a fruitful cooperation between the national courts and the Community Court’.<sup>96</sup>

Direct effect is a legal doctrine developed by the ECJ whereby individuals may claim rights conferred directly by a Council directive. The initial rationale of direct effect is to secure the effectiveness of EC law by providing individuals with the right to rely on this legislation when member states fail to comply with it. Although the national courts of the EU member states are responsible for ensuring compliance with Community law, the ultimate responsibility rests with the European Court of Justice.

Nevertheless, the ECJ can exercise its power as a guardian of Community legislation only if a national court case is referred to it by a member state or by one of the EU institutions, depending on the character of the suspected violation. As a general rule, individuals cannot bring cases directly before the ECJ. They may, however, challenge an act of one of the EU institutions in the European Court of First Instance. TEC Article 226 is also relevant here, as it provides that the Commission may deliver a ‘reasoned opinion’ if it suspects that a member state has failed to fulfil an obligation under the treaty. The Commission may bring the matter before the ECJ if the state does not comply with its opinion.

An important step for enhancing cooperation in the Community pillar was the adoption of the 1986 Single European Act, which established the free movement of goods, labour, services and capital among the members of the then EEC.<sup>97</sup> The EU is today one of the world’s most outward-oriented economies.

The European Commission is responsible for matters related to the EU’s external trade. In its work it must balance the need for the EU to remain competitive against other areas of concern such as

Reference for a preliminary ruling, Judgement of 30 Sep. 2003, *European Court Reports*, 2003, p. I-10239; and Case C-173/03, *Traghetti del Mediterraneo*, Reference for a preliminary ruling, Judgement of 13 June 2006, *European Court Reports*, 2006, p. I-5177.

<sup>96</sup> Blockmans, S., ‘Application of Community law by national courts: when and how to request preliminary rulings from the ECJ’, <<http://www.abgm.adalet.gov.tr/appl.pdf>>, p. 2.

<sup>97</sup> The Single European Act was signed at Luxembourg on 17 Feb. 1986 and at The Hague on 28 Feb. 1986 and entered into force on 1 July 1987.

environmental protection and external security. The Commission is divided into 45 directorates-general, each of which is responsible for one of the many policy areas that belong to the Community competences.<sup>98</sup> Unsurprisingly, discord arises from time to time between them. The Commission also represents the EU in international forums such as the World Trade Organization, negotiating for the economic interests of the EU. The legal basis for the EU's common commercial policy is TEC Article 133, which establishes that the policy should be based on uniform principles and includes export policies and measures to protect trade.<sup>99</sup> A special committee known as the Article 133 Committee meets weekly to discuss and coordinate the common commercial policy.

The TEC includes two important exceptions to the application of its provisions.<sup>100</sup> First, no member state is obliged to supply information the disclosure of which it considers contrary to its essential national security interests. Second, a member state may take any measures it considers necessary for national security related to the production of or trade in conventional arms, munitions and war material. However, such measures must not adversely affect common market competition regarding products that are not intended for specifically military purposes.

### **Common Foreign and Security Policy**

As the European Community developed, the member states recognized the need to coordinate national foreign policies in order to achieve the goals set at the Community level. The first step towards coordination was taken through Article 30 of the 1986 Single European Act, which formalized the European Political Cooperation (EPC).<sup>101</sup> This article stipulated that member states were to work towards the joint formulation and implementation of a European foreign policy. Reference to the EPC was also made in the preamble of the Single European Act, which states that the envisaged European Union should be implemented 'on the basis,

<sup>98</sup> Of the 45 DGs, 18 deal with policy and 6 with external relations, while the rest are more administrative.

<sup>99</sup> Treaty establishing the European Community (note 82), Article 133 (ex Article 113).

<sup>100</sup> Treaty establishing the European Community (note 82), Article 296 (ex Article 223).

<sup>101</sup> Single European Act (note 97), Title III, Article 30.

firstly, of the Communities operating in accordance with their own rules and, secondly, of European Co-operation among the Signatory States in the sphere of foreign policy'.<sup>102</sup>

In practice, the scope of the EPC included many areas of foreign policy but activities were restricted to declaratory, rather than operational, interventions. The reason for this limitation was to allow the member states to forge consistent foreign policies while avoiding challenges to the common Community goals. However, the vague wording of Article 30, the nature of intergovernmental cooperation and the fact that the ECJ has never had jurisdiction over the EPC or its successor, the CFSP, made it rather toothless.

Recognizing the need for a framework for coordination of foreign policy and given the success of cooperation in the Community framework, the member states began to examine the possibility of establishing a more consistent framework for foreign policy cooperation. Thus, in the 1992 TEU the EU member states laid the foundations of the CFSP.<sup>103</sup>

The CFSP constitutes the first codified step towards a common EU foreign policy. It differs from the EPC in its introduction of concrete strategic measures that go beyond the declaratory statements provided for in the Single European Act: the TEU states that the Union should pursue the objectives set out in the CFSP, for example by adopting common positions and joint actions.<sup>104</sup>

The CFSP is characterized by intergovernmental cooperation: the EU member states are meant to work together to enhance and develop their political solidarity. This is accomplished through policies established by the European Council.<sup>105</sup> The member states must refrain from any action that is contrary to CFSP purposes or is likely to impair the EU's effectiveness as a cohesive force in international relations.<sup>106</sup> Nevertheless, it should be recalled that each member state has the sovereign right to conduct its foreign relations independently, as long as in doing so it does not contravene EU common positions. This may go some way

<sup>102</sup> Single European Act (note 97), Preamble.

<sup>103</sup> On the Treaty on European Union see note 80 and the glossary in this volume.

<sup>104</sup> Treaty on European Union (note 80), Article 12 (ex Article J.2).

<sup>105</sup> Treaty on European Union (note 80), Article 13 (ex Article J.3). On the European Council see the glossary in this volume.

<sup>106</sup> Treaty on European Union (note 80), Article 11(2) (ex Article J.1).

towards explaining why it has proved so difficult to reach consensus on foreign policy matters at the EU level: member states may be reluctant to sacrifice their freedom to manoeuvre by committing to common positions.

CFSP cooperation is marked by a separation of Community and intergovernmental competences.<sup>107</sup> The European Commission is involved in the work carried out in the field of the CFSP. TEU Article 14(4) provides that the Council may request the Commission to submit to it any appropriate proposals relating to the CFSP, specifically to ensure the implementation of Council joint actions. Furthermore, Article 18 stipulates that the Commission is 'fully associated' in tasks related to the representation of the EU in matters related to the CFSP and the implementation of legislation adopted within this area of EU cooperation. However, it should be recalled that, unlike those on Community matters, decisions in the area of the CFSP are taken by the member states through the Council and require consensus. In effect, a member state can veto proposals for legislation under the CFSP.<sup>108</sup> Such proposals can be submitted by the Commission or a member state.<sup>109</sup>

From the start, there were competing visions of which body—the Council or the Commission—should formulate foreign policy. This led to expectations that the 1997 Treaty of Amsterdam would introduce comprehensive institutional reform to make the CFSP more coherent.<sup>110</sup> However, this treaty left the established structure largely unchanged, although it did introduce a range of new instruments and established a more efficient decision-making process. For example, it made CFSP decisions subject to a system of constructive abstention under which a member state could abstain from a vote, and thus not be obligated to apply the decision, but must accept that the decision represents a commitment by the

<sup>107</sup> Barbé, E., 'The evolution of CFSP institutions: where does democratic accountability stand?', *International Spectator*, vol. 39, no. 2 (Apr.–June 2004).

<sup>108</sup> On the power of the veto in the European Council see Tallberg, J., *Bargaining Power in the European Council*, Swedish Institute for European Policy Studies (SIEPS) Report 2007:1 (SIEPS: Stockholm, Feb. 2007), p. 20.

<sup>109</sup> Treaty on European Union (note 80), Article 22(1) (ex Article J.12).

<sup>110</sup> The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts was signed at Amsterdam on 2 Oct. 1997 and entered into force on 1 May 1999, *Official Journal of the European Communities*, C 340, 10 Nov. 1997.

Union.<sup>111</sup> This instrument was introduced in an attempt to reduce the use of vetoes, which had previously hindered much CFSP cooperation. Another novel provision in the Treaty of Amsterdam is the possibility of adopting joint actions or common positions or taking other decisions under the second pillar by QMV if they are based on a common strategy or implement a joint action or common position. This method can only be used if no member state objects on the grounds of conflict with important national policy.<sup>112</sup>

Some important provisions relating to the CFSP included in the now defunct 2004 Constitutional Treaty have been carried over to the Lisbon Treaty, albeit toned down considerably.<sup>113</sup> For example, the Constitutional Treaty sought to establish the position of 'EU foreign minister'. Because the term 'foreign minister' was thought to connote supranational powers, the Lisbon Treaty instead creates a 'High Representative of the Union for Foreign Affairs and Security Policy'.<sup>114</sup> Nevertheless, the purpose of this position is still to enhance coherence across the first and second pillars by combining the roles of the present High Representative for the CFSP and the Commissioner for External Relations.

After almost 15 years of intergovernmental cooperation the CFSP has proved to be a good forum for close dialogue on some specific security-related topics, including non-proliferation strategy, but it has also exposed areas where member states are persistently unwilling to relinquish any elements of their sovereignty. For example, the EU member states have never reached a common position on the US-led military operation in Iraq.

### **Police and Judicial Cooperation in Criminal Matters**

That cooperation between states on issues relating to both internal and foreign affairs sooner or later also requires enhanced cooperation in justice and home affairs was recognized by the EU as early as 1992. The Maastricht Treaty, signed in that year, introduced provisions on cooperation in the fields of justice and home affairs,

<sup>111</sup> Treaty of Amsterdam (note 110), Article 23(1) (ex Article J.13).

<sup>112</sup> Treaty of Amsterdam (note 110), Article 23(2) (ex Article J.13).

<sup>113</sup> On the Constitutional Treaty and the Lisbon Treaty see notes 76 and 75, respectively, and section IV below.

<sup>114</sup> Treaty of Lisbon (note 75), Article 18 TEU.

in Title VI of the treaty.<sup>115</sup> The provisions covered police and judicial cooperation in criminal matters, asylum policy, the crossing of external borders, immigration policy, combating drug addiction and fraud on an international scale, judicial cooperation in civil and criminal matters, customs cooperation, and certain forms of police cooperation. The 1997 Treaty of Amsterdam considerably changed the form of third-pillar cooperation by transferring to the Community pillar areas related to immigration, asylum, border control and visas. This step was taken on the rationale that the member states should have a comprehensive approach to migration and other such matters, given the free movement of people within the EU.<sup>116</sup> Thus, EU justice and home affairs matters were split between the first, Community, pillar and the third pillar, now governing only police and judicial cooperation in criminal matters.

A 1998 Council and Commission Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an 'area of freedom, security and justice' in the EU—the Vienna Action Plan—listed a number of priorities and measures—which were to be undertaken within two and five years, respectively—under both the first and the third pillars.<sup>117</sup> Under the third pillar, the plan called for enhanced exchange of information on crime prevention and intensification of the work to

identify the behaviour in the field of organised crime, terrorism, and drug trafficking for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties and, if necessary, elaborate measures accordingly.<sup>118</sup>

This was subsequently reflected in the Nice amendments to the TEU.<sup>119</sup> It also called for the establishment of a research and documentation network and for improved statistics on cross-border

<sup>115</sup> Treaty of Maastricht (note 80), Title VI, Article K1.

<sup>116</sup> The current scope of police and judicial cooperation is laid out in Treaty on European Union (note 80), Article 29.

<sup>117</sup> Council of the European Union and European Commission, Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (Vienna Action Plan), adopted by the Justice and Home Affairs Council at Vienna on 3 Dec. 1998, *Official Journal of the European Communities*, C 19, 23 Jan. 1999, pp. 1–15.

<sup>118</sup> Vienna Action Plan (note 117), para. 46(a).

<sup>119</sup> Treaty on European Union (note 80), Article 31.

crime.<sup>120</sup> Finally, exchange of information, promotion of cooperation and joint training initiatives, and exchange of liaison officers were all put on the agenda. The Title VI programmes that already covered these areas thereby acquired renewed legal justification.

In October 1999 the Tampere Special European Council created the area of freedom, security and justice.<sup>121</sup> This Council agreed on a five-year programme that set out a framework for EU policy in the fields of justice and home affairs. Some of the main objectives of the Tampere Programme guidelines were: better access to justice in Europe; mutual recognition of judicial decisions; prevention of crime at the EU level; and enhanced cooperation against crime. It was suggested that a number of institutions should be established, such as Eurojust (the judicial cooperation unit) and the European Police College (CEPOL).<sup>122</sup> The Tampere Programme was intended to demonstrate the EU's new emphasis on crime prevention. The European Council invited the Commission to develop a proposal for an annual 'scoreboard' to review progress towards the creation of an area of freedom, security and justice in accordance with deadlines set by the Treaty of Amsterdam, the Vienna Action Plan and the Tampere Programme.<sup>123</sup>

Since the entry into force of the Treaty of Amsterdam in 1999, the scope of the third pillar has been restricted to cooperation between member states' judiciaries, police forces and customs authorities and harmonization of actions between the member states in criminal matters and combating racism and xenophobia.<sup>124</sup> The fact that these areas remain under the third pillar means that the right of initiative in the area of police and judicial cooperation in criminal matters is still shared by the Commission and the member states. The Council has overall decision-making power concerning issues under Title VI of the TEU.<sup>125</sup> Eurojust was for-

<sup>120</sup> Vienna Action Plan (note 117), para. 48(a)(iii).

<sup>121</sup> Tampere European Council, Presidency Conclusions, 15–16 Oct. 1999, <[http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm)>.

<sup>122</sup> On these bodies see chapter 5, sections I and III, in this volume.

<sup>123</sup> See European Union, 'Commission Communication: scoreboard to review progress on the creation of an area of "Freedom, Security and Justice" in the European Union', 24 Mar. 2000, COM(2000) 167 final/2, Brussels, 13 Apr. 2000.

<sup>124</sup> Treaty on European Union (note 80), Article 29 (ex Article K.1)

<sup>125</sup> For the types of legal act that are available to the Council in the third-pillar framework see section I above.

mally created by a Council decision in February 2002, after the 2001 Treaty of Nice included in its amendments to the TEU provisions for Eurojust's establishment as a vehicle of judicial cooperation.<sup>126</sup>

A final assessment of the Tampere Programme released in 2004 concluded that substantial progress had been made towards achieving the programme's objectives.<sup>127</sup> However, it also noted that work remained to be done in the areas of member states' police and judicial cooperation in criminal matters. The assessment reflects how member states are sometimes reluctant to cooperate fully in the new European framework when their own special interests are at stake. Nevertheless, some legislative steps were taken during the period. For example, in 2002 the Council adopted the European arrest warrant (EAW), which was proposed by the Commission as a follow-up to the Tampere Council's demand for the renewal and simplification of extradition procedures within the EU.<sup>128</sup> The challenge of implementing the warrant then fell to the EU.

The Commission launched a public consultation process in June 2004 calling for proposals for a new programme for 2005–2010, building on the priorities identified at Tampere.<sup>129</sup> This took place against a backdrop of heightened debate on international counter-terrorism cooperation inspired by the terrorist attacks on the USA of 11 September 2001 and, more recently, those on Madrid of 11 March 2004. The EU approach to countering the new terrorist threat in the West could be detected in, for example, the creation

<sup>126</sup> Council Decision 2002/187/JHA of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *Official Journal of the European Communities*, L 63, 6 Mar. 2002, pp. 1–13. The role of Eurojust is referred to in articles 29 and 31 (ex articles K.1 and K.3) of the Treaty on European Union (note 80). On the current mandate and activities of Eurojust see chapter 5, section III, in this volume.

<sup>127</sup> European Commission, 'Area of freedom, security and justice: assessment of the Tampere programme and future orientations', Communication from the Commission to the Council and the European Parliament, COM(2004) 401 final, Brussels, 2 June 2004, pp. 3–4.

<sup>128</sup> On the EAW see chapter 5, section III, in this volume.

<sup>129</sup> See European Commission, Communication from the Commission to the Council and the European Parliament, COM(2004) 4002 final, Brussels, 2 June 2004; and European Commission, 'Commission presents communication on results of the Tampere programme and future guidelines: "Much has been done, but much also remains to be done"', Press release IP/04/702, 2 June 2004, <<http://europa.eu/rapid/>>.



of the EU Action Plan on Combating Terrorism and the appointment of an EU counterterrorism coordinator.<sup>130</sup>

On 4 November 2004 The Hague European Council adopted the new five-year programme.<sup>131</sup> This programme takes into account the Commission's final evaluation of the Tampere Programme.<sup>132</sup> For each objective The Hague Programme lists the relevant forms of follow-up action needed, the deadlines and the responsible authorities. Its priority areas are similar to those of the Tampere Programme, but with an additional emphasis on organized crime and terrorism. The current provision in this regard is TEU Article 29. The article also provides that efforts are to focus on: (a) closer cooperation between police forces, customs authorities and other competent authorities in the member states, both directly and through the European Police Office (Europol);<sup>133</sup> (b) closer cooperation between national judicial and other competent authorities; and (c) 'approximation' (convergence), where necessary, of rules on criminal matters in the member states.<sup>134</sup>

In addition to these provisions, the Treaty on European Union outlines some specific forms of cooperation.<sup>135</sup> These include joint training initiatives, the promotion of cooperation and research, and the compatibility of rules throughout the EU. It also lays down the conditions for the function of Europol by stipulating that the Council shall promote cooperation through the agency.<sup>136</sup>

The now defunct Constitutional Treaty re-emphasized the objective of providing for EU citizens 'an area of freedom, security and justice without internal frontiers' and an 'internal market where competition is 'free and undistorted' and was in many respects a natural consequence of the progress made at Amster-

<sup>130</sup> Council of the European Union, EU Plan of Action on Combating Terrorism, 10586/04, 15 June 2004. The plan has been regularly updated.

<sup>131</sup> European Council, Presidency Conclusions, 14292/1/04 REV 1, Brussels, 8 Dec. 2004, Annex I, 'The Hague Programme: strengthening freedom, security and justice in the European Union', pp. 11–42.

<sup>132</sup> European Commission (note 127).

<sup>133</sup> Convention on the establishment of a European police office (Europol Convention), signed on 26 July 1995 and entered into force on 1 Oct. 1998, *Official Journal of the European Communities*, C 316, 27 Nov. 1995, pp. 2–32. See also chapter 5, section I, in this volume.

<sup>134</sup> Treaty on European Union (note 80), articles 30 and 31 (ex articles K.2 and K.3).

<sup>135</sup> Treaty on European Union (note 80), articles 30 and 31 (ex articles K.2 and K.3).

<sup>136</sup> Treaty on European Union (note 80), Article 30(2) (ex Article K.2).

dam, Tampere, Nice and The Hague.<sup>137</sup> Adoption of the treaty would have initiated some important general changes in decision-making procedure, but the division of powers was not to be significantly altered in the area of freedom, security and justice. The latter was still intended to be constituted ‘with respect for . . . the different legal systems and traditions of the Member States’,<sup>138</sup> and the unanimity of the Council was still to be a precondition for legislation in the area of police cooperation. The priority action areas in relation to police and judicial cooperation contained in the previous treaties were written into the Constitutional Treaty and into its successor, the Lisbon Treaty, for instance concerning the training of judicial and law enforcement personnel.

The Lisbon Treaty, like the Constitutional Treaty, is intended to create the basis for common definitions of serious cross-border crimes by establishing the following:

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.<sup>139</sup>

This would extend the provisions in the current TEU Article 31 by adding significantly to the list of crimes covered and allowing the minimum rules on common definitions and sanctions to be enshrined in supranational EU legislation rather than simply calling for the ‘progressive adoption of measures’ through common action. An ‘emergency brake’ was inserted in the article that would allow a member state to refer a draft directive to the European Council if it considers that the legislation would adversely affect

<sup>137</sup> Constitutional Treaty (note 76), Article I-3.

<sup>138</sup> Constitutional Treaty (note 76), Article III-257 (ex TEC Article 61 and TEU Article 29).

<sup>139</sup> Treaty of Lisbon (note 75), Article 83 TFEU (ex TEU Article 31). The same text is found in the Constitutional Treaty (note 76), Article III-271 (ex TEU Article 31).

fundamental aspects of a national criminal justice system.<sup>140</sup> This proposed system is intended to ensure that heads of member state governments remain involved in the development of fundamental objectives that relate to their criminal justice systems.

Since the start of cooperation in justice and home affairs, with the entry into force of the Maastricht Treaty in 1993, the field has gradually increased within the limits set by the 1997 Amsterdam Treaty. However, decisions in these areas generally remain the prerogative of member states. Some member states have proved more willing than others to relinquish a degree of sovereignty in fields related to cooperation on justice, freedom and security. A critical topic of debate in the negotiations on the Lisbon Treaty was the concern expressed by Denmark, Ireland and the UK about cooperation concerning policies related to the free movement of persons. In order to avoid deadlock, these three states were granted opt-out clauses, meaning that they may decide whether to adopt and apply European measures agreed in the relevant areas on a case-by-case basis.<sup>141</sup>

### III. The three areas of competence and dual-use export controls

One of the main aims of the 1986 Single European Act was to create a customs union to ensure the free movement of all civil goods, including most dual-use goods, within the single market.<sup>142</sup> The current principles of the European Customs Union are embodied in the 2001 Nice Treaty, which also sets out the rules for Community trade policy.<sup>143</sup> Duties and charges that have an equivalent effect on the free circulation of goods may not be applied on transfers within the Community area.<sup>144</sup> Furthermore, the Nice Treaty

<sup>140</sup> Treaty of Lisbon (note 75), Article 83(3) TFEU (ex Article 31 TEU).

<sup>141</sup> See also section IV below.

<sup>142</sup> Single European Act (note 97). Internal customs duties were abolished gradually between 1961 and 1968, when a common external tariff for trade with third countries was also introduced.

<sup>143</sup> Treaty establishing the European Community (note 82), articles 23 and 133 (ex articles 9 and 113).

<sup>144</sup> Treaty establishing the European Community (note 82), Article 25 (ex Article 12). The concept of 'equivalent effect' was first established by the ECJ in Case 24/68, *Commission vs Italian Republic*, Judgement of 1 July 1969, *European Court Reports*, 1969,

establishes that common customs tariffs for exports from the Customs Union are to be fixed by the Council, which decides, by QMV, on a proposal from the European Commission.<sup>145</sup>

To ensure compliance with the common customs tariffs regime, the Nice Treaty provides that the Council, acting within the scope of application of the treaty, shall take measures 'to strengthen customs cooperation' between member states and between the member states and the Commission. However, it also stipulates that such measures 'shall not concern the application of national criminal law or the national administration of justice'.<sup>146</sup> The Nice Treaty thus draws a clear line between Community powers and powers in the third pillar, on cooperation in criminal law and judicial matters.

Linked to the idea that member states are not to apply customs duties on transfers of goods within the EU is the idea they may not apply different policies for exports to third countries. Exports of dual-use goods are regulated under the Community pillar.<sup>147</sup> The legal basis for this control is Article 133 of the TEC.<sup>148</sup> For the most part, dual-use goods belong to the class of goods in free circulation within the Community area regardless of whether they have been produced within the area or have been imported into it. The only items that are exempted from free circulation are listed in Annex IV to the EC Dual-use Regulation. These products require intra-Community control because of their proliferation-sensitive nature.<sup>149</sup> The Council decides by QMV on a proposal from the European Commission regarding the regulations to be applied to dual-use goods.<sup>150</sup> Although restrictions on customs duties and

p. 193. For an extensive review of the nature of 'equivalent effect' see Ortina, F., *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Hart Publishing: Oxford, 2004), pp. 47–55.

<sup>145</sup> Treaty establishing the European Community (note 82), Article 26.

<sup>146</sup> Treaty establishing the European Community (note 82), Article 135 (ex Article 116).

<sup>147</sup> For a detailed analysis of the legal aspects of the dual-use regime see Koutrakos, P. and Emiliou, N., 'Strategic export controls, national security and the common commercial policy', *European Foreign Affairs Review*, vol. 1, no. 1 (1996), pp. 55–78.

<sup>148</sup> Treaty establishing the European Community (note 82), Article 133 (ex Article 113).

<sup>149</sup> On the annex lists, see the glossary and chapter 4, section I, in this volume. As the focus of this study is exports from the EU, these intra-Community controls are not discussed.

<sup>150</sup> The European Parliament has only a consultative role in these decisions. See section I above.

export controls are regulated under different provisions in the TEC, the goal is the same: to prevent distortion of trade in the EU.

To ensure coherence in the control of exports of sensitive goods, such goods are subject to common controls and require export authorization from the competent national authority. This system is currently set out in the EC Dual-use Regulation. It builds on mutual trust among national authorities and mutual recognition of export licences.<sup>151</sup> A member state cannot, in principle at least, stop a consignment that transits its territory en route to a third country if another member state has authorized the export.<sup>152</sup>

However, member states' right to intervene in an export authorized by another member state was examined by the ECJ under its preliminary reference procedures in 1989, when the court was asked to determine the extent to which member states may restrict the freedom of transit of goods on their territories.<sup>153</sup> In this case, a French company had undertaken to deliver high-technology goods to Russia. The goods were confiscated by the state authorities of Luxembourg, despite the general principle of freedom of transit of goods within the Community. The exporter had completed the necessary formalities in France for the goods to be exported to Russia, but the Luxembourg authorities nevertheless charged the exporter with attempting to effect the unlawful transit of goods subject to a licence requirement, a provision found in Article 10 of Council Regulation 222/77 on Community transit.<sup>154</sup>

The ECJ was asked to establish whether Luxembourg was entitled to impose restrictions on common transit on the basis of national laws. It ruled that the right of a member state to impose restrictions must be determined in the broader scope of the TEC, particularly Article 28, which refers to the prohibition on member states' imposition of quantitative restrictions on imports and all

<sup>151</sup> Council Regulation 1334/2000 (note 8).

<sup>152</sup> The free transit of goods applies only to civilian goods and dual-use goods not listed in Annex IV of the EC Dual-use Regulation. Military goods are excluded from free circulation in accordance with TEC Article 296 (ex Article 223), as are the particularly sensitive dual-use goods listed in Annex IV. See also chapter 4, section II, in this volume.

<sup>153</sup> European Court of Justice, Case C-367/89, *Criminal proceedings against Richardt*, Reference for a preliminary ruling, Judgement of 4 Oct. 1991, *European Court Reports*, 1991, p. I-4621.

<sup>154</sup> Council Regulation (EEC) no. 222/77 of 13 Dec. 1976 on Community transit, *Official Journal of the European Communities*, L 38, 9 Feb. 1977, pp. 1-19.

measures that could have an equivalent effect.<sup>155</sup> The article had to be read in parallel with Article 30, which stipulates that Article 28 does not preclude prohibitions or restriction on imports, exports or goods in transit justified on public security grounds.<sup>156</sup> Article 30 further provides that such restrictions must not be used as means of arbitrary discrimination or a disguised restriction on trade between member states. The ECJ referred the matter to national courts to decide whether it was proportionate to confiscate the goods, acknowledging that 'It is common ground that the importation, exportation and transit of goods capable of being used for strategic purposes may affect the public security of a Member State, which it is therefore entitled to protect'.<sup>157</sup>

The decision to regulate dual-use exports exclusively under Community law is relatively recent. The potential civil and military uses of dual-use goods has caused disagreement among the EU member states over whether they should be regulated within the framework of Community law or they are the exclusive competence of member states under the second pillar. After three years of negotiations, the EU member states agreed in 1993 on a legal compromise: the common rules on exports and the procedures were laid down in Council Regulation (EC) 3381/94, adopted under TEC Article 113 (on the common commercial policy, now Article 133), but the control lists were set out in a joint action adopted in the CFSP framework under Title V of the TEU, to be incorporated in a Council decision.<sup>158</sup>

Council Regulation 3381/94 was generally applicable and strictly binding before the ECJ and the national courts of member states. In contrast, Council Decision 94/942/CFSP, which incorporated the joint action, was subject to the exclusive control of the member states. This division of powers between the Community and the member states caused some confusion along the chain of implementing actors, at both the EU and national levels.

<sup>155</sup> Treaty establishing the European Community (note 82), Article 28 (ex Article 30).

<sup>156</sup> Treaty establishing the European Community (note 82), Article 30 (ex Article 36).

<sup>157</sup> European Court of Justice, Case C-367/89 (note 153), para. 22.

<sup>158</sup> Council Regulation (EC) 3381/94 of 19 Dec. 1994 setting up a Community regime for the control of exports of dual-use goods, *Official Journal of the European Communities*, L 367, 31 Dec. 1994, pp. 1-7; and Council Decision 94/942/CFSP of 19 Dec. 1994 on the joint action adopted by the Council concerning the control of exports of dual-use goods, *Official Journal of the European Communities*, L 367, 31 Dec. 1994, pp. 8-163.

Despite the complicated legal ground on which the first EU regime for control of exports of dual-use goods rested, the principles were easy to follow. The main principle that underpinned the system was that civilian trade should not undermine the essential security interests of the member states or their commitment to WMD non-proliferation. Recognizing that WMD proliferators could take advantage of the free circulation of goods by choosing to export from the states with the weakest licensing system—so-called licence shopping—the member states concluded that their systems for dual-use exports had to be harmonized.

Hence, even when the EC Dual-use Regulation was adopted, the EU member states agreed that the system they had created was only preliminary until they could agree on a legal foundation for the EU regime on the control of dual-use goods.<sup>159</sup> In addition to the problem surrounding decision making on issues related to the export regime, a 1998 Commission report to the European Parliament and the Council noted problems related to national application of the 1994 regulation:

The practical problems with the application of the Regulation all appear fundamentally linked to the fact that the present Community export control regime is essentially limited to a mutual-recognition exercise. Member states have agreed to recognise each others' export licences but do not necessarily agree with each others' different export policies underlying these licences. There is a lack of agreement in substance which cannot indefinitely continue if an effective common export control regime is to function properly.<sup>160</sup>

The solution to many of these problems came in 1999, when the member states agreed to replace the 1994 compromise with a new system, mainly because the ECJ had ruled on several disputed issues.<sup>161</sup> Having established in these two cases that dual-use goods

<sup>159</sup> See Council Regulation 3381/94 (note 158), Preamble, which also states that 'in particular, it is desirable that the authorization procedures applied by the Member States should be harmonized progressively and speedily'.

<sup>160</sup> European Commission, Report to the European Parliament and the Council on the application of Regulation (EC) 3381/94, COM(98) 258 final, Brussels, 15 May 1998, p. 12.

<sup>161</sup> These ECJ judgements were: Case C-83/94, *Criminal proceedings against Leifer and others*, Reference for a preliminary ruling, Judgement of 17 Oct. 1995, *European Court Reports*, 1995, p. I-3231; and Case C-70/94, *Werner vs Germany*, Reference for a preliminary ruling, Judgement of 17 Oct. 1995, *European Court Reports*, 1995, p. I-03189.

fell within the exclusive competence of the Community, the ECJ ruled that an integrated system—with a legislative base spread between the first and second pillars—violated Community law.

In one of these cases, the court was asked to consider the limits of member states' right to restrict goods in transit on the grounds of external security. The court ruled that the rules restricting exports of dual-use goods fall within the scope of Article 113 of the Treaty of Rome—on the common commercial policy—so the Community has exclusive competence. This therefore excludes the competence of member states except where the Community grants them specific authorization.<sup>162</sup>

A similar approach was taken in the second case: the court established that 'a measure . . . whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside of the scope of the common commercial policy on the ground that it has foreign policy and security objectives'.<sup>163</sup> These two rulings thus established that the regulation of dual-use goods falls within Community competence and that goods in common transit can be restricted on national security grounds only in exceptional cases.<sup>164</sup> Such restrictions must be proportionate to what they are intended to achieve.

The replacement that was proposed was a single Council regulation, based on a Council decision, that would include an annex of listed products and destinations of agreed concern. This became the 2000 EC Dual-use Regulation, Council Regulation (EC) 1334/2000, which entered into force in September 2000. Regulation 1334/2000 gave the Commission the exclusive right of initiative, and all related Council decisions were henceforth to be taken by QMV. It also strengthened the legal position of exporters by placing all parts of the export control regime under Community law. Any dispute relating to exports of dual-use goods can today be

<sup>162</sup> European Court of Justice, Case C-83/94 (note 161), Court summary.

<sup>163</sup> European Court of Justice, Case C-70/94 (note 161), para. 10.

<sup>164</sup> For a legal review of the 2 cases see Hippler Bello, J., Kokott, J. and Rudolf, B., 'Fritz Werner Industrieausrüstungen GmbH v. Federal Republic of Germany Criminal Proceedings against Leifer', *American Journal of International Law*, vol. 90, no. 2 (Apr. 1996), pp. 286–90; and Koutrakos, P., *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Hart: Oxford, 2001).



brought before the ECJ, provided that the common criteria for court procedure are fulfilled.

Regulation 1334/2000 included many new provisions—among them the creation of the Community general export authorization (CGEA), the clarification of some important definitions, further reduction in licensing requirements for intra-Community trade, reinforcement of administrative cooperation and extension of the scope of the regulation to include dual-use technology.<sup>165</sup>

#### IV. The future of the European Union institutional framework

The EU's competences under the Community pillar allow it to obligate all member states to require licences to export the items on the common list and have in place appropriate penalties for violations as well as effective systems for enforcing the relevant legislation. The EU's current competences go no further than this, however—it is the responsibility of each member state to interpret 'proportionate, dissuasive and effective sanctions' and 'effective system for law enforcement'.<sup>166</sup> In addition, the task of issuing licences is entrusted to national authorities. Since the police, judiciary and customs agencies fall under the EU's third pillar, Police and Judicial Cooperation in Criminal Matters, they are all subject to national prerogatives.<sup>167</sup>

There are, however, indications that the EU pillar structure is beginning to crumble, possibly because of the current lack of a dynamic EU legal structure, which makes implementation of EU objectives a slow process. First, the 2004 Constitutional Treaty, in the interest of greater structural transparency, was to confer on the Union a single legal personality, removing the pillar structure. This was to be accompanied by the introduction of a simplified hierarchy for legal acts, with explicit recognition of the primacy of EU law, as well as clarification of the respective competences of the

<sup>165</sup> On the CGEA see chapter 4, section I, and the glossary in this volume.

<sup>166</sup> However, the ECJ has developed secondary law in the form of judgements to answer the question of what constitute 'proportionate, dissuasive and effective sanctions'.

<sup>167</sup> On the distribution of legislative powers between the Council and the Parliament see section I.

member states and of the Union. This was to be achieved by replacing the current legal acts (mainly framework decisions) in the third pillar with those used for normal legislative procedure—that is, through co-legislation by the European Parliament and the Council. Such acts were also to be subject to review by the ECJ.

The drafters of the Constitutional Treaty also proposed that cooperation in areas related to police and judicial matters should be enhanced by abolishing the third pillar and extending the Community method to virtually all aspects of this field of activity. The proposal identified a need to enhance operational cooperation between the competent authorities of the EU states, in particular on the basis of mutual recognition of judicial and extrajudicial decisions. However, the relevant article recognized that member states have different legal traditions and systems.<sup>168</sup> It also included a provision on the creation of a standing committee by the Council to ensure that operational cooperation on internal security would be promoted and strengthened within the Union, but it did not explain which operations would be subject to such cooperation.

France and the Netherlands rejected the Constitutional Treaty in referendums in 2005. Nevertheless, during the German Presidency of the Council in the first half of 2007, German Chancellor Angela Merkel revitalized discussions on EU institutional reform. The German Presidency drafted a ‘reform treaty’, which was subsequently signed in Lisbon on 13 December 2007, during the Portuguese Presidency. The Lisbon Treaty includes amendments to the two core EU treaties, the TEU and the TEC. The Lisbon Treaty includes most provisions of the Constitutional Treaty but allows states to make reservations on some sensitive issues in order to avoid a new round of national referendums. The Lisbon Treaty could therefore be described as a diluted version of the Constitutional Treaty. Clear signs of its diluted character are the inclusions of opt-out clauses and ‘emergency brakes’.<sup>169</sup> The opt-out clauses are reserved for member states, such as Ireland and the UK, that have signed specific protocols exempting them from cooperation in specific fields. The ‘emergency brakes’ allow a

<sup>168</sup> Constitutional Treaty (note 76), Article III-257.

<sup>169</sup> See e.g. Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. The Protocol is annexed to the Treaty of Lisbon (note 75).

member state to refer an issue to the European Council if it believes that its national interests are at stake and provided that some procedural criteria are fulfilled.<sup>170</sup>

The future of the Lisbon Treaty is uncertain after voters in Ireland rejected ratification of the treaty in a June 2008 referendum. Without ratification by all member states, the treaty cannot enter into force. The fact that all member states have already signed the Lisbon Treaty indicates that all of the state representatives are in favour of the current text, the result of lengthy negotiations. Only time will tell whether European citizens will share their leaders' conviction that the EU's institutional legal framework must be revised in order to keep the EU afloat. In the meantime there must be a serious review of the areas where EU competences are vague and thus risk challenging the principle of legality.

Leaving the Lisbon Treaty aside, a few other areas should be mentioned where the EU institutional framework seems to be fracturing. During an informal meeting of EU justice and home affairs ministers in September 2006, the Commissioner for Justice, Freedom and Security, Franco Frattini, proposed removing the national veto under the third pillar. His proposal was strongly opposed by those who argued that the third pillar should remain intergovernmental.<sup>171</sup>

Another area is obvious from two ECJ judgements, one from 2005 on environmental protection and one from 2007 on maritime pollution.<sup>172</sup> In these judgements the court set what is potentially a precedent for legislation in other fields by ruling that the Commission has the legal competence to propose appropriate common sanctions to enforce elements of Community law.<sup>173</sup> A third area was revealed in 2006, when the Commission suggested that the 1995 Europol Convention should be replaced with a Council decision in order to provide Europol with enhanced legal powers. These powers were to include an extended mandate covering all

<sup>170</sup> On the emergency brakes see Treaty of Lisbon (note 75), articles 82(3) and 83(3) TFEU (both ex Article 31 TEU).

<sup>171</sup> Bilefsky, D., 'EU fails to agree on policing role', *International Herald Tribune*, 22 Sep. 2006.

<sup>172</sup> European Court of Justice, Case C-176/03 (note 14); and European Court of Justice, Case C-440/05, *Commission vs Council*, Judgement of 23 Oct. 2007, *European Court Reports*, 2007, p. I-9097.

<sup>173</sup> On the implications of these 2 rulings see chapter 4, section IV, in this volume.

forms of serious cross-border crime and to exercise certain police powers during international events.<sup>174</sup> This would take the agency another step towards becoming a European police force.

Although it may be politically attractive to leave the legal composition of the EU unchanged, it puts great pressure on a unit such as the WMD Monitoring Centre to create synergies between institutions in a field as politicized as WMD non-proliferation.<sup>175</sup> The particular challenge is that the current EU non-proliferation regime—like the international regime of UN Security Resolution 1540—holds member states responsible for establishing effective law enforcement measures, including appropriate sanctions when export laws are violated. This system is a reflection of state sovereignty, to which all states are entitled by international law. However, considering the complex legal structure of the EU, which is composed of some areas that are supranational and some that are not, this structure has the potential to reduce the effectiveness of the EU WMD non-proliferation regime and water down the function of a unit such as the WMD-MC.

<sup>174</sup> European Commission, Proposal for a Council Decision establishing the European Police Office (Europol), COM(2006) 817 final.

<sup>175</sup> On the WMD Monitoring Centre see chapter 2, section IV, in this volume.

## 4. Enforcing the EC Dual-use Regulation at national level

Like all other sovereign states, the EU member states may have shifting and even conflicting interests that influence the extent to which they want to control their exports of dual-use goods. Their national interests may hinge on, for example, whether they have a large commercial dual-use goods industry to protect or are facing security threats. However, due to the common legislation governing the export of dual-use items from the European Community area, such interests should not influence the decisions of the national licensing authorities. Rather, potential disagreement is more likely to appear in the Council when the respective national ministers of trade meet to legislate in the area. Nevertheless, national interests may influence policy on whether violators of export control legislation should be brought to trial or instead dealt with through administrative procedures, since this is decided at the national level. Such policy divergences are generally difficult to identify since the EU does not have a formal system for following up the national application of common legislation. Because of the principle of free circulation of goods in the single market, efforts must be focused on the crucial task of effective enforcement of the common legislation on trade with third countries.

### I. The licensing mechanism and procedures

In 2000 the 1994 EC Dual-use Regulation was superseded by Regulation 1334/2000 and control of the export of dual-use goods was made subject to Community legislation.<sup>176</sup> The EU member states agreed on a set of restrictions that reflect their international commitments. The lists of controlled dual-use items in annexes I and IV of the 2000 EC Dual-use Regulation reflect the control lists of the Australia Group, the NSG, the MTCR and the Wassenaar Arrangement. Furthermore, they 'shall be updated in conformity with the relevant obligations and commitments, and any modification thereof, that each Member State has accepted as a member

<sup>176</sup> See chapter 3, section III, in this volume.

of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties'.<sup>177</sup> This objective criterion avoids the need for complicated negotiations over what items should be included in the common control lists in which member states might try to protect their subjective interests—for example, by excluding dual-use items of which they are the sole producer.

The annex lists of the EC Dual-use Regulation are crucial instruments for the authorization of exports. Annex I contains a list of dual-use items that require authorization for export from the EU area.<sup>178</sup> Annex IV lists items that are considered so sensitive that they require authorization even before they are transferred from one EU state to another—in other words, it sets out exceptions to the free movement of goods within the Community area.

Annex II sets out the current conditions for the Community general export authorization, including a list of third countries to which all but the most sensitive dual-use items (those listed in Annex IV) may be sent without seeking further authorization.<sup>179</sup> As of December 2009, there are seven such countries, all of which are have ratified WMD non-proliferation treaties and cooperate in multilateral export control regimes.<sup>180</sup> All products that are not covered by the CGEA remain subject to state controls. The purpose of Annex II is to facilitate authorization processes at the national level. It can also be seen as a step towards enhanced cooperation on licensing procedures, as it represents the delegation of a degree of power from the member states to the Commission.

Member states exchange information about their denials of licences in order to ensure that all the licensing authorities are fully aware of any potential proliferation risks. Should a licensing authority in a member state deny the export of a non-listed dual-use product, it must post this information in a central database that is accessible to all member states. The system of denial notifi-

<sup>177</sup> Council Regulation 1334/2000 (note 8), Article 11.

<sup>178</sup> There is inevitably scope for a degree of discretion by national licensing authorities in the interpretation of the items on the control lists and anecdotal evidence suggests that their interpretations are sometimes rather narrow. On the annex lists see the glossary in this volume.

<sup>179</sup> On the term 'third countries' see the glossary in this volume.

<sup>180</sup> These 7 countries are Australia, Canada, Japan, New Zealand, Norway, Switzerland and the USA. Council Regulation 1167/2008 (note 8).

cations is meant to prevent licence shopping by proliferators and to harmonize national export control systems. In cases where aspects of a specific transfer are unclear or in dispute, the responsible national authorities in the country from which the goods are to be exported can contact the national authorities in the country where the licence was issued. Alternatively, the European Commission can assist in resolving the case. States must keep information and records about dual-use exports according to agreed criteria in order to facilitate the process of dispute resolution and help make information exchanges more useful.

Article 8 of the EC Dual-use Regulation constitutes the legal basis for the issuing of licences for the export of dual-use goods from the EU area. It states that, in deciding whether or not to grant an export authorization under the regulation,

Member states shall take into account all relevant considerations including:

- (a) the obligations and commitments they have each accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties;
- (b) their obligations under sanctions imposed by a common position or a joint action adopted by the Council or by a decision of the OSCE [Organization for Security and Co-operation in Europe] or by a binding resolution of the Security Council of the United Nations;
- (c) considerations of national foreign and security policy, including those covered by the European Union Code of Conduct on arms exports;<sup>181</sup>
- (d) considerations about intended end-use and the risk of diversion.<sup>182</sup>

An export authorization can be revoked or altered only by the agency that originally issued it—member states cannot, in principle, prevent goods from being exported through their territory if

<sup>181</sup> Council of the European Union, European Union Code of Conduct on Arms Exports, 8675/2/98 Rev 2, Brussels, 5 June 1998, <[http://consilium.europa.eu/cms3\\_fo/showPage.asp?id=408](http://consilium.europa.eu/cms3_fo/showPage.asp?id=408)>. The Code is reproduced in appendix A. The Code is a politically binding instrument that seeks to create 'high common standards' for all EU members to use when making arms export decisions and to increase transparency among EU states on arms exports. See Bauer, S. and Bromley, M., *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, SIPRI Policy Paper no. 8 (SIPRI: Stockholm, Nov. 2004); and Bromley, M., *The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain*, SIPRI Policy Paper no. 21 (SIPRI: Stockholm, May 2008), <<http://books.sipri.org>>.

<sup>182</sup> Council Regulation 1334/2000 (note 8), Article 8.

the export has been authorized by another member state, although they must be consulted before the licensing decision is made and may lodge an objection.<sup>183</sup> If a member state is of the opinion that an export ‘might prejudice its national security interests’, it can request another not to authorize the export or to revoke, suspend or modify an existing authorization.<sup>184</sup> Also, a member state cannot authorize an export within three years of an ‘essentially identical transaction’ being denied authorization in another member state or states, without consulting those member states and explaining its decision to the other member states and the Commission.<sup>185</sup>

### **Controlling unlisted dual-use goods**

The 2000 EC Dual-use Regulation, like the 1994 Dual-use Regulation, includes a ‘catch-all clause’. This instrument, found in Article 4 of the 2000 regulation, allows national authorities to impose a licensing requirement for the export of items that are not listed in Annex I of the regulation but (a) are or may be intended for uses connected with WMD or their means of delivery; (b) are or may be intended for a military end-use, if the purchasing or destination country is subject to an EU, OSCE or UN arms embargo; or (c) are or may be intended as parts or components of military items that have already been exported illegally. In each case, the authorities must send a ‘catch-all warning’ to the exporter specifying the grounds for the licensing requirement. Furthermore, an exporter who is aware that an item he or she plans to export is intended for one of those uses must notify the authorities, which can decide whether to impose a licensing requirement.<sup>186</sup> Use of the catch-all clause should be reported to the other member states and the Commission ‘where appropriate’.<sup>187</sup>

Article 5 of the regulation complements the catch-all clause, allowing member states to prohibit or impose a licensing require-

<sup>183</sup> Council Regulation 1334/2000 (note 8), Article 7(1), and Article 9(2). See chapter 3, section III, in this volume, on the different levels of discretion for stopping goods in transit that member states have enjoyed under Regulation 3381/94 and Regulation 1334/2000.

<sup>184</sup> Council Regulation 1334/2000 (note 8), Article 7(2).

<sup>185</sup> Council Regulation (EC) no. 1334/2000 (note 9), Article 9(3).

<sup>186</sup> Council Regulation 1334/2000 (note 8), Article 4(1–4).

<sup>187</sup> Council Regulation 1334/2000 (note 8), Article 4(6).



ment on the export of items not listed in Annex I for 'reasons of public security or human rights considerations'. If a member state exercises this right, it must immediately report it to the Commission.<sup>188</sup> Articles 4 and 5 together give governments considerable authority to decide when to stop the export of an unlisted item.

The catch-all instrument is necessary in order to keep export controls up to date with rapid technological developments and with new intelligence about possible military applications of civil items. Between 2002 and 2007, the four main multilateral export control regimes all added similar catch-all clauses to their guidelines.<sup>189</sup>

Several factors can affect how the individual EU member states apply the catch-all clause at national level. For example, Article 4 grants member states the right to strengthen the responsibility of exporters by means of national legislation imposing a licensing requirement if the exporter even suspects that an item intended for export may be used in connection with WMD proliferation.<sup>190</sup> The sanctions imposed for violations of Article 4, especially for failing to report the intended military use of a dual-use export, also affect the strength of the catch-all instrument.

### Enforcement of Article 3

Article 3 of the EC Dual-use Regulation stipulates that 'An authorisation shall be required for the export of the dual-use items listed in Annex I.' While this simple provision applies equally to all EU member states, legal outcomes of an unauthorized export from the

<sup>188</sup> Council Regulation 1334/2000 (note 8), Article 5(2).

<sup>189</sup> The Australia Group, Guidelines for Transfers of Sensitive Chemical or Biological Items, June 2007, <<http://www.australiagroup.net/en/guidelines.html>>; Missile Technology Control Regime, Guidelines for Sensitive Missile-relevant Transfers, <<http://www.mtrc.info/english/guidetext.htm>>; Nuclear Suppliers Group, Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology (INFCIRC/254/rev. 7/part 2), Feb. 2006, Section 5; and Wassenaar Arrangement, Statement of Understanding on Control of Non-Listed Dual-Use Items, 2003, <<http://www.wassenaar.org/guidelines/>>. On the multilateral export regimes see chapter 2, section III, in this volume.

<sup>190</sup> Council Regulation 1334/2000 (note 8), Article 4(5). Austria has introduced a similar provision in its catch-all legislation, requiring an exporter to seek an export licence if he or she 'has reason to believe' that the item is for WMD end-use. Foreign Trade Order (Außenhandelsverordnung 2005), Bundesgesetzblatt II, 121/2006, 17 March 2006.

Community area can be different depending on the member state from which the exporter chooses to export.

Although the EC Dual-use Regulation is generally and directly applicable in the member states, it needs to be supplemented by national legislation in areas where the EU does not have legislative competence. Thus, the national legislation of the respective member states intended to give force to, for example, Article 3 of the EC Dual-use Regulation may vary in substance.<sup>191</sup> One group of states, which includes Germany, has in place legislation providing for strict liability; a second group, including Sweden, does not.<sup>192</sup> This has practical consequences for prosecutions.

The German Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) criminalizes export violations related to dual-use goods and provides that ‘A prison sentence of up to five years or a fine may be imposed on anyone who exports or transfers [controlled items] without a licence’.<sup>193</sup> In contrast, the 2000 Swedish Act on the Control of Dual-use Items and Technical Assistance does not include acts of negligence: ‘Anyone who *intentionally* without permission [exports dual-use products] will be sentenced to a fine or imprisonment for up to two years’.<sup>194</sup> The language of the two laws has an important effect on prosecutors’ ability to enforce Article 3 of the EC Dual-use Regulation. In the German system, an exporter is unlikely to avoid conviction by claiming ignorance of the licensing requirement—although lighter sanctions apply for crimes of negligence.<sup>195</sup> In Sweden, an exporter who can

<sup>191</sup> Some international provisions always need to be supplemented by national legislation, e.g. sanctions for violations of the EC Dual-use Regulation.

<sup>192</sup> Details of the German and Swedish legislation are provided in chapter 6, sections I and II, respectively, in this volume.

<sup>193</sup> Section 34(I), of the Foreign Trade and Payments Act of 28 Apr. 1961, Bundesgesetzblatt (BGBl) I, 1961, p. 481, as amended by the 12th law amending the AWG of 28 Mar. 2006, BGBl I, 2006, p. 574. An unofficial translation of the AWG is available at <[http://www.bafa.de/bafa/en/export\\_control/legislationexport\\_controlLawg\\_en.pdf](http://www.bafa.de/bafa/en/export_control/legislationexport_controlLawg_en.pdf)>.

<sup>194</sup> Section 18 of the Act on the Control of Dual-use Products and Technical Assistance (Lag om kontroll av produkter med dubbla användningsområden och av tekniskt bistånd) implementing Regulation (EC) 1334/2000, of 30 Nov. 2000, Svensk författningssamling (SFS) 2000:1064, as amended by the Act amending the Act on the Control of Dual-use Products and Technical Assistance (Lag om ändring i lagen (2000:1064) om kontroll av produkter med dubbla användningsområden och av tekniskt bistånd), of 13 Nov. 2008, SFS 2008:887. Emphasis added. An unofficial translation of the original act is available at <<http://www.sipri.org/contents/expcon/swe1064.html>>.

<sup>195</sup> Foreign Trade and Payments Act (note 193), Section 34(7).

prove ignorance of the licensing requirement may avoid conviction, although exporters who violate the law through gross negligence face penalties in the same range as those who offend with intent.<sup>196</sup> Thus, in Germany the onus is on exporters to acquaint themselves with the licensing requirements, while in Sweden the onus is on the authorities to inform exporters.

In most EU member states, unlicensed exports of dual-use goods are treated as criminal offences but strict liability does not apply. Thus, prosecutors must prove an offender's intent. This highlights the need for outreach to exporting industries, laboratory researchers and others who might potentially export dual-use goods. If it can be shown that a company has been informed about the correct export procedures or about the dual-use nature of products for export, proving intent will be much easier. Similarly, it will be sufficient for a prosecutor to prove that a catch-all warning was issued and that it was received by the addressee at the appropriate time in order to prove that the violation was intentional.<sup>197</sup>

## II. Law enforcement agencies and their roles

It is important to recall that, while dual-use export control laws are made at EU level, the enforcement of those laws are exclusively a function of the member states. States have discretion in the interpretation of those laws, so there is always a possibility that they are not being applied uniformly. As regards the enforcement of EC law, the principle of procedural autonomy applies: the member states are allowed to apply existing national enforcement mechanisms and penalties for breaches of EC law as long as they meet the conditions of necessity and equivalence. In this context, equivalence requires that member states must mutually recognize each other's systems. In a 1981 ruling, the ECJ established that Community law sets certain limits on control measures, administrative measures and sanctions it permits the EU member states to apply in connection with the free movement of goods and per-

<sup>196</sup> Act on the Control of Dual-use Products and Technical Assistance (note 194), Section 19.

<sup>197</sup> The importance of correct catch-all procedures in the context of prosecutions is illustrated by the Dutch case study in chapter 6, section III, in this volume.

sons.<sup>198</sup> These limits are meant to prevent the erosion of this free movement. Since the law enforcement systems of the EU member states differ from state to state, for the purpose of this Research Report it is important to define the concept of law enforcement from a functional perspective.

Law enforcement comprises the measures taken by state officials who have the legal mandate to enforce the law. Each state has its own legislation and divides the powers and responsibilities of the various agencies involved differently, so no exhaustive or definitive list of EU member states' law enforcement actors can be drawn up. For example, intelligence officers would only be considered law enforcement actors in some countries.<sup>199</sup> Nevertheless, the law enforcement tasks that must be carried out are the same for all states and include investigating suspected crimes, detecting smuggling activities, intercepting illegal transfers, monitoring communications and conducting arrests.

Despite the differences between their law enforcement structures, all the EU member states have the same responsibility to enforce EU legislation. The EC Dual-use Regulation requires that 'Each Member state shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation'.<sup>200</sup> A similar requirement for effective law enforcement systems to comply with applicable export control legislation is set out in UN Security Council Resolution 1540. The EC Dual-use Regulation is currently being revised to bring it in line with the resolution.

<sup>198</sup> European Court of Justice, Case C-203/80, *Criminal proceedings against Guerrino Casati*, Reference for a preliminary ruling, Judgement of 11 Nov. 1981, *European Court Reports*, 1981, p. I-2595, para. 27. See also European Court of Justice, Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG vs Landwirtschaftskammer für das Saarland*, Reference for a preliminary ruling, Judgement of 16 Dec. 1976, *European Court Reports*, 1976, p. I-1989. In the latter case the ECJ established that, since there are no procedural rules at Community level, member states must deal with procedures to enforce Community law in their domestic legal systems (the principle of procedural autonomy); however, these laws must meet 2 criteria: (a) the remedies provided by national courts for the enforcement of EC law have to be equivalent to those for the enforcement of national law; and (b) conditions for remedies before national courts should not make the enforcement of EC law impossible in practice.

<sup>199</sup> E.g. the Polish Internal Security Agency (Agencja Bezpieczeństwa Wewnętrzznego) has law enforcement powers: among other things it can conduct criminal investigations, carry out arrests and search premises.

<sup>200</sup> Council Regulation 1334/2000 (note 8), Article 19.

This section focuses on national customs agencies because they have the difficult daily task of detecting unauthorized exports of dual-use goods destined to leave the EU area. As noted above, this task is usually shared with national police and intelligence services.

The steady growth in international trade has increased the number and volume of shipments crossing the borders of the EU. At the same time, global competition puts the operators of seaports, airports and land crossings under pressure to help goods move quickly along transit routes. These factors partly explain why physical inspections are not carried out as often or thoroughly as would be needed to detect all the illegal trade in dual-use goods. Instead, most customs agencies focus on other preventive measures, such as risk assessments of exporters and exported items. In 2005 a number of such measures became mandatory through a revision of the Community Customs Code.<sup>201</sup> The introduction and linking of electronic customs systems throughout the EU under the e-Customs initiative will also have an important preventive function. The Community Customs Code is discussed below and e-Customs in chapter 5.

The notion of preventive measures should be highlighted in this context: non-proliferation efforts fail the moment an unauthorized delivery of a dual-use item slips out of a state's control and is on its way to a sensitive destination. Since the interception of transiting dual-use goods on the high seas, for example, is a much greater challenge for the law enforcement system due to international legal restrictions imposed by the international agreements governing the high seas, it is crucial to prevent goods from ever leaving the Community area.<sup>202</sup> Thus, ensuring that all exporters of dual-use goods come into contact with qualified national customs agents is a key element in combating the proliferation of WMD.

<sup>201</sup> Regulation (EC) 648/2005 of the European Parliament and of the Council of 13 Apr. 2005 amending Council Regulation (EEC) 2913/92 establishing the Community Customs Code, *Official Journal of the European Union*, L 117, 4 May 2005, pp. 13–19. On these measures see Anthony, I., Bauer, S. and Wetter, A., 'Controls on security-related international transfers', *SIPRI Yearbook 2008* (note 1), pp. 507–10.

<sup>202</sup> The main international agreement regulating the high seas is the United Nations Convention on the Law of the Sea, which was opened for signature at Montego Bay, Jamaica, on 10 Dec. 1982 and entered into force on 16 Nov. 1994. The text of the convention is available at <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm)>.

## The Community Customs Code

The European Community Customs Code regulates the activities of the national customs services of the EU member states and lays down the common procedures that these services use for the clearance of imported and exported goods.<sup>203</sup> The main provision of the Code relating to the role of the law enforcement community is Article 177:

Goods leaving the customs territory of the Community shall be subject to customs supervision and may be subject to customs controls. Where appropriate, the customs authorities may . . . determine the route to be used, and the time limit to be respected when goods are to leave the customs territory of the Community.<sup>204</sup>

In practical terms, member states' customs services apply a control strategy based on risk management for dealing with consignments that are subject to control measures, including consignments of dual-use goods.

In response to the terrorist attacks on Madrid in 2004, the European Council issued the Declaration on Combating Terrorism, one element of which was a commitment to protect the security of international transport and ensure effective systems of border control.<sup>205</sup> Subsequently, the EU has added a greater public security element to customs work, including by revisions to the Community Customs Code.<sup>206</sup> Updating of the Customs Code's parameters for risk analysis was among several security-related amendments to

<sup>203</sup> The EU Customs Code was established by Council Regulation (EEC) 2913/92 of 12 Oct. 1992 establishing the Community Customs Code, *Official Journal of the European Communities*, L 302, 19 Oct. 1992, pp. 1–50. It has been amended several times. The version currently in force is referred to as the Modernized Customs Code, established by Regulation (EC) 450/2008 of the European Parliament and of the Council of 23 Apr. 2008 laying down the Community Customs Code (Modernised Customs Code), *Official Journal of the European Union*, 2008, L 145. The Modernized Customs Code was first proposed in European Commission, 'A simple and paperless environment for Customs and Trade', Communication to the Council, the European Parliament and the European Economic and Social Committee, COM(2003) 452 final, 24 July 2003.

<sup>204</sup> Regulation 450/2008 (note 203).

<sup>205</sup> European Council, Declaration on combating terrorism, Brussels, 25 Mar. 2004, <<http://ue.eu.int/uedocs/cmsUpload/79635.pdf>>.

<sup>206</sup> On these revisions to the Community Customs Code see Anthony, Bauer and Wetter (note 201).

the Code that were introduced by the European Parliament and the Council in 2005.<sup>207</sup>

A common approach was laid down for risk management of the export of items of potential security concern. This includes a common framework for the management, analysis and evaluation of risks associated with controls on goods. The framework makes it possible to share information on risks and apply uniform risk-selection criteria. The amendment also introduced the requirement for traders to provide customs authorities with information on goods prior to their export from and import into the EU, meaning that risk analysis could be performed prior to the goods departing from the jurisdiction of EU enforcement authorities.

The new regulation also established a timetable for the strengthened security component of the Community Customs Code, with most of the key elements scheduled to be introduced by the end of 2008. In December 2006 the Commission published detailed implementing regulations to help reach this goal.<sup>208</sup>

The Commission asserted in a 2001 communication that it was advisable to harmonize penalties among the member states for the purposes of rationalizing and simplifying customs legislation.<sup>209</sup> It further suggested that, in order to improve customs controls at state level, action should be taken to improve cooperation between customs administrations and tax and police authorities; that instruments for risk analysis should be used more effectively; and that joint audit modules should be further developed between the Commission and member states. Some of the points raised in the 2001 communication have now been introduced in practice.

In parallel with the Council's amendment of the Community Custom Code, the European Commission's Directorate-General for Taxation and Customs Union (DG-TAXUD) established the EU

<sup>207</sup> Regulation (EC) 648/2005 of the European Parliament and of the Council of 13 Apr. 2005 amending Council Regulation (EEC) 2913/92 establishing the Community Customs Code, *Official Journal of the European Union*, L 117, 4 May 2005.

<sup>208</sup> Commission Regulation (EC) 1875/2006 of 18 Dec. 2006 amending Regulation (EEC) 2454/93 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code, *Official Journal of the European Union*, L 360, 19 Dec. 2006, pp 64–125.

<sup>209</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee concerning a strategy for the Customs Union, Brussels, 8 Feb. 2001, COM(2001) 51 final.

Customs Security Programme (CSP).<sup>210</sup> The programme covers activities to support the development and implementation of measures to enhance security through improved customs controls. It is an essential component of DG-TAXUD's work, because its primary responsibility is to ensure a competitive EU marketplace. Under its Customs 2002 programme, DG-TAXUD established a standardized framework for risk management.<sup>211</sup> The policy that the EU risk management strategy builds on is presented in the Commission's customs strategy.<sup>212</sup> The programme then established that the operational services need to share information for the purpose of identifying the risks posed by the illegal trade in goods. The EU and member states have worked together to create a catalogue of risk indicators that support the identification and assessment of risks for economic operators. These indicators are available to the national customs services. Since the launch of the e-Customs initiative in 2005, the member states have had common guidelines for the coordination of risk management systems.<sup>213</sup>

A 'complete overhaul' of the Community Customs Code was adopted in April 2008 and entered into force in June, the culmination of a process that began in 2003.<sup>214</sup> The new instrument, referred to as the Modernized Customs Code, is intended to streamline Community customs procedures, establishing electronic customs declarations and procedures as the rule in all member states and providing for electronic exchange of customs data.

<sup>210</sup> European Commission, Taxation and Customs Union Directorate-General, 'Customs and security', 16 Aug. 2007, <[http://ec.europa.eu/taxation\\_customs/customs/policy\\_issues/customs\\_security/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_security/index_en.htm)>.

<sup>211</sup> On the risk management framework see European Commission, Taxation and Customs Union Directorate-General, 'Risk management for customs in the EU', 17 Nov. 2004, <[http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/risk\\_management/customs\\_eu/](http://ec.europa.eu/taxation_customs/customs/customs_controls/risk_management/customs_eu/)>. The Customs 2002 programme ran from 1 Jan. 2001 to 31 Dec. 2002. See European Commission, Taxation and Customs Union Directorate-General, 'Customs 2002', 30 Sep. 2004, <[http://ec.europa.eu/taxation\\_customs/customs/cooperation\\_programmes/customs\\_2007/article\\_696\\_en.htm](http://ec.europa.eu/taxation_customs/customs/cooperation_programmes/customs_2007/article_696_en.htm)>. See also chapter 5, section II, in this volume.

<sup>212</sup> Communication from the Commission (note 209).

<sup>213</sup> European Commission, Taxation and Customs Union Directorate-General, 'Electronic customs', 7 Dec. 2005, <[http://ec.europa.eu/taxation\\_customs/customs/policy\\_issues/e-Customs\\_initiative/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/policy_issues/e-Customs_initiative/index_en.htm)>; and European Commission, 'Customs: Commission proposes a new strategy', Press release IP/01/219, Brussels, 16 Feb. 2001. On e-Customs see chapter 5, section II, in this volume.

<sup>214</sup> Regulation 450/2008 (note 203), pp. 1-64.



The Modernized Code provides the legal bases for electronic customs procedures and for ‘centralized clearance’, a system by which member states may allow exporters to present goods for export and lodge export declarations in different member states, depending on where the goods are and where the exporter is established. The customs office at which the goods are presented may impose its own controls on the export and must also carry out any examination of the goods ‘justifiably’ requested by the office at which the declaration was registered.<sup>215</sup>

### III. The role of prosecution services

The principle that states have discretion in interpreting what is meant by ‘effective law enforcement’ in, for example, Security Council Resolution 1540 and the EC Dual-use Regulation also applies to the prosecution services of the EU member states in their role in ensuring that criminals are brought to trial. There are thus differences between the member states in the relationships between the public prosecutor and the police and between the public prosecutor and the justice ministry, and in the roles of the public prosecutor in court and in proposing appropriate sanctions.

Prosecution can be a particularly important part of the enforcement process by deterring or incapacitating export offenders who operate with the intent to help states or non-state actors to acquire WMD. As noted above, prosecution can serve both to punish wrongdoing and to avoid repeat offences (special prevention) and may be a deterrent to others (general prevention).<sup>216</sup> However, because of the complex nature of export control laws, prosecutors must be well trained in applying them. In addition, they must also be fully versed in their national legislation. For example, in Germany prosecutors must be aware that liability could fall on company directors, managers and secretaries.<sup>217</sup>

<sup>215</sup> Regulation 450/2008 (note 203), Article 106.

<sup>216</sup> On the terms ‘general prevention’ and ‘special prevention’ see the glossary and chapter 1, section I, in this volume.

<sup>217</sup> In addition to EU and national legislation there is an extensive international body of law that may be applied by prosecutors in national courts in cases of unlicensed exports of dual-use items, but this subject is outside the scope of this report. An example

Prosecutors must also understand the consequences following from breaches of export laws in the context of WMD proliferation because they would then realize how important it is to file appropriate charges and seek appropriate penalties for offenders. Prosecuting export offenders is a particular challenge in many states because of the difficulty of proving intent. Export violations are committed for a wide variety of reasons. An exporter—or other actor in the exporting chain—may have the express purpose of providing a state or non-state actor with items that can be used in the manufacture of WMD or their means of delivery. This is presumably rare. Alternatively, the offender may only hope to profit from the lucrative trade in dual-use goods or may simply fail to apply for a licence through negligence.

EU member states also differ in their decision-making processes for initiating legal proceedings in a case. Depending on the state, a prosecution may be initiated by one or more agencies, for example the customs office or the office of the public prosecutor. In some states, prosecutors have a duty to take the case to trial whenever there is sufficient evidence. This group includes Sweden. In other states, additional criteria may need to be fulfilled before a case is taken to trial. This group includes the UK, where prosecutors need to determine how far taking a case to trial serves the public interest. Factors taken into consideration often include the severity of the alleged offence and its likely impact on the public, the intent and attitude of the alleged offender, possible measures taken or not taken by the offender to prevent the offence from occurring or to minimize its consequences, the criminal record of the offender, and the circumstances leading to the offence.<sup>218</sup>

In a third group of states, prosecutors do not have a duty to prosecute under a specific law but are granted discretion to decide when it is appropriate to do so, taking into account available resources, time and other considerations. This group includes the Netherlands. In such countries prosecution itself could be briefly described as following the rules of law and procedure in force for offences of comparable severity. Consequently, in systems that

of an export control violation resulting in a conviction under international law was the *van Anraat* case. See note 372, below.

<sup>218</sup> These criteria are usually also applied to decide the appropriate sentence on conviction.

grant prosecutorial discretion, it is crucial that prosecutors are convinced of the severity of a certain crime, since they may not otherwise choose to refer a case to the court.

Alternatives to criminal proceedings may be appropriate in minor cases, particularly when an export control violation is committed through negligence. Authorities may consider administrative measures such as issuing warnings or remediation orders. National laws could also offer offenders the option of taking voluntary action to mitigate the damage caused by their offence and to prevent recurrence in exchange for less severe punishment. However, in the case of suspected serious export control violations it is important that the public prosecutor takes all necessary steps to bring the case to trial.

#### IV. Harmonization of penalties?

Just as those seeking to illegally export dual-use items from the EU are likely to use the member state where they have the least likelihood of detection, they may also look for the state that applies the lightest penalties for such offences. This raises the controversial question of whether national legal penalties for export offenders should be harmonized within the EU. In response to UN Security Council Resolution 1540, which obliges all UN member states to have either administrative or criminal sanctions in place for violations of export control laws, in 2006 the EU carried out a survey of the sanctions applied under the national legislation of member states.<sup>219</sup> The questionnaire responses showed considerable variation from state to state.

At the time of the survey, the maximum penalties for breaches of the common legislation on dual-use goods in the EU states ranged from 12 months' imprisonment (in Ireland) to 15 years (in Germany).<sup>220</sup> All the responding member states applied criminal sanctions for serious violations of the EC Dual-use Regulation's licensing requirements. Furthermore, 15 of 22 member states

<sup>219</sup> On the survey see note 12.

<sup>220</sup> For Ireland see European Communities (Control of Exports of Dual-Use Items) Regulations, Statutory Instrument no. 317 of 2000, Regulation 8; and for Germany see Foreign Trade and Payments Act (note 193), sections 33–34.

imposed strict liability for violators, compared to just 7 that criminalized only intentional violations.<sup>221</sup>

Administrative sanctions applied for dual-use export violations include fines and revocation of export licences. Warning letters are commonly used in the case of first or minor violations. In the majority of the EU states, the customs agency is the responsible authority. Most member states also impose other sanctions, including restrictions on the use of CGEAs, and have legal provisions for additional penalties with a legal basis other than Article 19 of the EC Dual-use Regulation, for example national penal codes. In the majority of EU member states, the customs agency is responsible for imposing administrative sanctions.

This apparent inconsistency between states' sanctions for breaches of the EC Dual-use Regulation, it should be recalled, arises from the fact that governments are responsible for deciding what sanctions are 'effective, proportionate and dissuasive' when drafting their national export control legislation.<sup>222</sup> This rule, which has also been established through several ECJ judgements, follows from the so-called principle of effectiveness (*'effet utile'*), which lays down the requirement for national parliaments to effectively give force to the EC law.<sup>223</sup> As early as 1984 the ECJ established that this 'does entail that [the] sanction be such as to guarantee real and effective judicial protection. Moreover, it must also have a real deterrent effect on [in this case] the employer'.<sup>224</sup>

Although the general rule is that neither the criminalization of conduct nor the rules of criminal procedure fall within Community competence, recent case law has begun to break new ground. In

<sup>221</sup> See appendix A in this volume on the national legislation implementing the export authorization requirement in Council Regulation 1334/2000 (note 8).

<sup>222</sup> Council Regulation 1334/2000 (note 8), Article 19. See also chapter 1, section II, in this volume. This principle was re-established by the ECJ in Case C-213/99, *de Andrade*, Reference for a preliminary ruling, Judgement of 7 Dec. 2000, *European Court Reports*, 2000, p. I-11083, para. 19.

<sup>223</sup> See European Court of Justice, Case C-203/80 (note 198); and European Court of Justice, Case C-226/97, *Criminal proceedings against Lemmens*, Reference for a preliminary ruling, Judgement of 16 June 1998, *European Court Reports*, 1998, p. I-3711. Both judgements lay down the general rule that neither criminal law nor the rules of criminal procedure fall within the Community's competence.

<sup>224</sup> European Court of Justice, Case C-14/83, *von Colson and Kamann vs Land Nordrhein-Westfalen*, Reference for a preliminary ruling, Judgement of 10 Apr. 1984, *European Court Reports*, 1984, p. I-01891, para. 23.

2005 the ECJ passed a judgement stating that the Commission may propose legislation obligating member states to adopt national legislation on criminal sanctions when it considers this necessary to ensure that the rules of the Community on environmental protection become fully effective.<sup>225</sup> In a second ECJ judgement, from 2007, relating to maritime pollution, the court made a similar interpretation of the Community's competence when it judged, in accordance with the Commission's view, that imposing criminal penalties for pollution from ships was within the Community's competence.<sup>226</sup> However, the ECJ later clarified that the Commission does not have the authority to stipulate the type and level of criminal penalty.<sup>227</sup> It has been argued that the judgements so far apply only to environmental legislation and that further case law is required to establish the scope of application of these judgements.

A limited Community competence in this area aligns with the fundamental principle that the ultimate power to criminalize conduct is legitimized by the will of the people in democratic states, and so should be retained by national parliaments. On top of this, there is such variety in the administrative legal traditions of the EU member states that one set of provisions, decided at EU level, would never sit easily in the national legislation of all of them. Nevertheless, coherent application of common EU legislation is important in order to prevent cooperation in the common market and other fields from being diluted and exploited for purposes of, for example, WMD proliferation. The coherence issue is thus closely related to the efficacy of the common legislation.

To address the lack of convergence in the national legislation of the member states' criminal sanctions for violations of the EC Dual-use Regulation, the Council published a statement on criminal sanctions in 2004.<sup>228</sup> Referring to Resolution 1540, the state-

<sup>225</sup> European Court of Justice, Case C-176/03 (note 14).

<sup>226</sup> European Court of Justice, Case C-440/05 (note 172). For a summary of the judgement see European Court of Justice, 'The European Community has the power to require the member states to lay down criminal penalties for the purpose of protecting the environment', Press Release 75/05, 13 Sep. 2005. For opposing views on this matter see 'Will court judgement lead to EU criminal sanctions?', EurActiv, 24 Nov. 2005, <<http://www.euractiv.com/en/article-149758>>.

<sup>227</sup> European Court of Justice, Case C-440/05 (note 172), para. 70. See also Mahoney, H., 'EU court delivers blow on environment sanctions', *EU Observer*, 23 Oct. 2007.

<sup>228</sup> Council of the European Union, Declaration by the European Council on criminal sanctions, Document no. 10774/04, Brussels, 23 June 2004.

ment urges all member states to take and enforce effective measures to prevent the proliferation of WMD and their means of delivery. The statement recalls the agreement made by the member states in the EU WMD Strategy to adopt common policies related to criminal sanctions for the illegal export, brokering and smuggling of WMD-related materials.<sup>229</sup>

The statement also declares an intent to bring together all the relevant bodies ‘to review the appropriate political and legal instruments . . . that would further the adoption of concrete steps towards this objective [of harmonizing criminal sanctions]’. These discussions are at an early stage and should be seen in the context of broader debates on EU competence regarding third-pillar issues. Furthermore, in a communication to the European Parliament and the Council, the Commission proposed that member states apply criminal sanctions for serious violations of the regulation in its amended version.<sup>230</sup>

Even while there has been strong opposition to the idea of introducing criminal sanctions in the EC Dual-use Regulation, the tendency to impose specific penalties—reflecting what seems to be a common understanding of the potential preventive function that penalties can have—is spreading to the multilateral export control regimes. Such provisions can be seen in, for example, the Wassenaar Arrangement’s Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS), a document by which the participating states commit themselves to ‘ensure that any infringement of export control legislation, related to MANPADS, is subject to adequate penalty provisions, i.e. involving criminal sanctions’.<sup>231</sup> However, even as criminalization of export control violations seems to be becoming increasingly common internationally, deciding which mechanisms are appropriate for enforcing export control laws remains a national matter in all the multilateral export control regimes.<sup>232</sup>

<sup>229</sup> On brokering see the glossary in this volume.

<sup>230</sup> See chapter 1, section II, in this volume; and European Commission (note 13).

<sup>231</sup> Wassenaar Arrangement, Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS), Vienna, Dec. 2003, <[http://www.wassenaar.org/public\\_documents/2002/2002\\_MANPADS.html](http://www.wassenaar.org/public_documents/2002/2002_MANPADS.html)>.

<sup>232</sup> On the multilateral export control regimes see chapter 2, section III, in this volume.

Another harbinger of greater convergence among the member states of the EU is the Lisbon Treaty's provision, in Article 83, for the adoption of supranational legislation establishing 'minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension'.<sup>233</sup> Although the crime areas that the article mentions do not specifically include trafficking in dual-use items, they do include terrorism and organized crime.

Whether the sanctions chosen by the member states are in fact in accordance with the requirement set by the EC Dual-use Regulation and UN Security Council Resolution 1540 is a question for national legislators to examine. However, when asked if the criminal sanctions should be harmonized at the EU level, 15 member states were in favour and one made a reservation but was not entirely opposed to the idea.<sup>234</sup> Only three of the 19 responding member states reported having practical experience of applying sanctions for breaches of Article 3(1) of the EC Dual-use Regulation (on non-compliance with the licensing requirement for listed dual-use goods). Criminal investigations had been carried out and a few had led to conviction in Germany. In Finland and the UK, only administrative sanctions had been imposed. The UK also reported that until shortly before the survey it had applied a policy of not prosecuting strict liability export control offences.<sup>235</sup> As shown in the case studies in chapter 6, both Germany and the UK have amassed more experience in penalizing export control violations since the survey.

<sup>233</sup> Treaty of Lisbon (note 75), Article 83(1) TFEU (ex Article 31 TEU). See also chapter 3, section II, in this volume.

<sup>234</sup> European Commission, Directorate-General for Trade, Working Party on Dual-use Goods (note 12), table 5, 'Answers regarding the opportunity to harmonize criminal sanctions'. Six countries did not respond to the question.

<sup>235</sup> See European Commission, Directorate-General for Trade, Working Party on Dual-use Goods (note 12), table 8.

## 5. Inter-agency cooperation at the European Union level

It is in the nature of international trade that international cooperation is required for the control of imports and exports. The EU common market, where goods move freely between participating states, is unusual in being a trade area where no such control is required. Thus, the establishment of the European Customs Union reduced the need for member states' customs authorities to cooperate in one respect but increased it considerably in another. When complete free movement of goods within the Union was initiated with the phasing out of trade tariffs between member states in 1968, there was no longer a need for member states to control goods crossing the internal borders of the EU. However, controlling imports and exports crossing the external borders became a matter of joint responsibility. Despite the existence of the Customs Union, cooperation between the member states is international except in matters where the Community Customs Code requires cooperation between customs offices in member states.<sup>236</sup>

Irrespective of whether a member state appoints its police, customs agency or even intelligence service as the actors responsible for enforcement of export control legislation, it needs to ensure that there are efficient means for cooperation between the competent state agencies and their counterparts in the other member states. The EU coordinates cooperation between the member states on issues that relate to law enforcement, prosecution and the judiciary through a number of agencies and networks. These mechanisms are examined in sections I–III below. The chapter ends with a discussion of the role that EU agencies play in WMD non-proliferation.

<sup>236</sup> On the Community Customs Code see chapter 4, section II, in this volume.



## I. Police cooperation

### **Europol**

The European Police Office, Europol, based in The Hague, is the EU's law enforcement organization and criminal intelligence office. The establishment of Europol was agreed in the 1992 Maastricht Treaty, and the 1995 Europol Convention is based on Article K.3 of that treaty. Europol started limited operations in 1999.

Europol was established to improve cooperation between the competent authorities of the member states, primarily to prevent and combat terrorism, drug trafficking and other serious forms of international organized crime.<sup>237</sup> Article 2 of the Europol Convention states that the agency's objective is

to improve . . . the effectiveness and cooperation of the competent authorities in the Member states in preventing and combating serious international crime where there are factual indications or reasonable grounds for believing that an organised criminal structure is involved and two or more Member states are affected in such a way as to require a common approach by the Member states owing to the scale, significance and consequences of the offences concerned.

Europol does not exercise executive powers and thus its officials are not entitled to conduct investigations in the member states and cannot arrest suspects. Rather, it may provide support, using such tools as information exchange, intelligence analysis, expertise and training. In this way Europol contributes to the executive measures carried out by the relevant national authorities. There have been significant demands to grant Europol formal investigative powers, including the power to use coercive law enforcement measures to be conducted on the territories of the member states, but the success of such proposals is likely to depend on the more general discussions on enhancing EU cooperation in the third pillar (see chapter 3).<sup>238</sup>

<sup>237</sup> Europol Convention (note 133), Article 2.

<sup>238</sup> See e.g. Hayes, B., "The future of Europol": more powers, less regulation, precious little debate', Statewatch Analysis, Aug. 2006, <<http://www.statewatch.org/>>. Europol's current tasks are listed in Article 3 of the Europol Convention (note 133).

One of the operational tasks of Europol listed in the Europol Convention is to establish and maintain a computerized system to facilitate information sharing and analysis. This system consists of three components: an information system, an analysis system and an index system. The information system, which is available to the member states and Europol only, allows for rapid referencing in order to speed up the exchange of information between law enforcement agencies. The analysis system includes 'analysis work files' containing information on crimes, suspects, potential witnesses and informants, victims of crime and others, which are created temporarily to support a criminal investigation. The index system allows users to see whether an item of information is held in the analysis work files. Access to these systems is limited.<sup>239</sup> Europol has improved its international law enforcement cooperation by negotiating bilateral operational or strategic agreements with non-EU member states and organizations.<sup>240</sup>

### **Other structures for police cooperation**

The European Crime Prevention Network (EUCPN) is another forum in which EU member states cooperate on police matters. It was established pursuant to Title VI of the 1999 Amsterdam Treaty through the adoption of a Council decision.<sup>241</sup> It is another outcome of the 1999 Tampere Special European Council and was formed to help improve protection for people living in the EU by setting up instruments to share information and best practices

<sup>239</sup> Europol Convention (note 133), articles 6–12; and Council Act of 3 Nov. 1998, adopting rules applicable to Europol analysis files, 3 Nov. 1998, *Official Journal of the European Communities*, C 26, 30 Jan. 1999, p. 1.

<sup>240</sup> Operational or strategic agreements have been made with Albania, Bosnia and Herzegovina, Canada, Colombia, Croatia, Iceland, the Former Yugoslav Republic of Macedonia, Moldova, Norway, Russia, Switzerland, Turkey and the USA. Agreements have been made with the EU bodies Eurojust, the European Central Bank, the European Commission, the European Monitoring Centre for Drugs and Drug Addiction and the European Anti-Fraud Office. See the website of the European Anti-fraud Office, OLAF, <[http://ec.europa.eu/anti\\_fraud/](http://ec.europa.eu/anti_fraud/)>. Europol also has agreements with 3 international organizations: Interpol, the United Nations Office on Drugs and Crime, and the World Customs Organization. See Europol, 'International relations: cooperation agreements', 22 Jan. 2009, <<http://www.europol.eu/index.asp?page=agreements>>.

<sup>241</sup> Council Decision 2001/427/JHA of 28 May setting up a European Crime Prevention Network, *Official Journal of the European Communities*, L 153, 8 June 2001, p. 1.

among member states.<sup>242</sup> A major objective of the EUCPN is to supplement and facilitate national crime prevention initiatives while highlighting topics of common interest. The network focuses on both general crime (with special emphasis on urban, juvenile and drug-related crime) and organized crime. The European Commission manages the network's secretariat, which is responsible for drafting annual reports, collecting and analysing information, and assisting the network's members.<sup>243</sup>

Another body, CEPOL, conducts joint police training in areas related to the fight against serious crime, with special emphasis on cross-border crime.<sup>244</sup> It was established through the adoption of a Council decision taken under Title VI of the TEU.<sup>245</sup> CEPOL's mandate is to train and educate senior police officials in the EU member states. Its main functions are to increase knowledge of the national police systems and structures of the other member states, of Europol and of cross-border police cooperation within the EU; to strengthen knowledge of international instruments; to provide appropriate training; and to encourage cooperation with other police training institutes.

Finally, the EU created the semi-formal European Police Chiefs Task Force (PCTF) to develop personal and informal links between the heads of the various national law enforcement agencies of the EU. Its purpose is to exchange information and to assist with the development of more spontaneous interaction and closer cooperation between national and local police forces and other EU law enforcement agencies. The network does not yet have a legal basis but has hosted meetings since 2000.<sup>246</sup>

<sup>242</sup> On the Tampere Council see chapter 3, section II, in this volume.

<sup>243</sup> See the EUCPN website, <<http://www.eucpn.org/aboutus/index.asp>>.

<sup>244</sup> Council Decision of 20 Sep. 2005, establishing the European Police College, 2005/681/JHA, *Official Journal of the European Union*, L 256, 1 Oct. 2005, pp. 63–70.

<sup>245</sup> Treaty on European Union (note 80).

<sup>246</sup> On the PCTF see Bunyan, T., 'The EU's Police Chief Task Force (PCTF) and Police Chiefs Committee', *Statewatch Analysis*, Mar. 2006, <<http://www.euractiv.com/en/security/eu-police-chief-task-force-police-chiefs-committee/article-153333>>.

## II. Customs cooperation

As described in chapter 4, the EU system rests on a common legal framework that governs the national customs agencies through the Community Customs Code. This section examines some other elements of cooperation in customs matters, including inter-governmental cooperation.

### The Naples conventions

EU member states cooperate at the operational level in the field of customs through the 1997 Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II Convention).<sup>247</sup> This treaty builds on and replaces the 1967 Naples Convention.<sup>248</sup> It is designed to reinforce cooperation between member states' authorities on customs and related law enforcement tasks. It provides for interstate assistance, on request or spontaneously. In practice, this implies cooperation on cross-border surveillance, 'controlled deliveries', covert investigations (allowing an officer of the customs administration of one member state to operate on the territory of another under cover of a false identity) and joint special investigation teams.<sup>249</sup> Cross-border cooperation may be permitted for the prevention, investigation and prosecution of a list of infringements, including trafficking in nuclear materials or in materials or equipment intended for the manufacture of NBC weapons.

<sup>247</sup> The Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II Convention) is included in a Council act of 18 Dec. 1997, *Official Journal of the European Communities*, C 24, Jan. 1998, pp. 2–22. It will enter into force when it has been ratified by all EU member states. As of Jan. 2009, 26 states have ratified the convention and 25 apply its provisions in their relations with each other.

<sup>248</sup> The Convention of the Member states of the European Economic Community on the provision of Mutual Assistance by their Customs Authorities (Naples I Convention) was signed in Rome on 7 Sep. 1967. The declarations by 25 member states that they will apply the Naples II Convention means that the Naples I Convention is *de facto* no longer in force.

<sup>249</sup> A controlled delivery is an investigation technique in which suspect or illicit consignments are not seized at the frontier but are kept under surveillance until they reach their destination.

### Initiatives to enhance customs cooperation

The EU has taken several initiatives to address strategically the need to enhance customs cooperation between member states. One such initiative is the Customs Information System (CIS), which builds on a 1995 Council act.<sup>250</sup> It was created as a development of the principles of the 1967 Naples I Convention.<sup>251</sup> The aim of this centralized system is to facilitate cooperation between customs administrations in the member states in combating customs-related crime. The CIS operates using two separate databases, one falling within the framework of European Community actions, and the other falling under intergovernmental action. The databases contain information on commodities, means of transport, businesses, persons, fraud trends and availability of expertise. Direct access to data in the CIS is reserved exclusively for the designated national authorities of each member state. Only the country that supplied data held in the system can revise, correct or amend it. The CIS is located in Brussels and is developed and managed by the European Anti-fraud Office (OLAF). The Commission's Directorate-General for Justice, Freedom and Security and DG-TAXUD are also involved in the development of the policy.

The idea of a control mechanism aimed at facilitating the detection of illicit imports and exports started to grow simultaneously with the idea of modernizing the Customs Code in 2003–2004 (see chapter 4).<sup>252</sup> The system for electronic customs declarations (known as electronic customs or e-Customs) aims to simplify customs procedures and provide electronic access to customs information for traders and for customs authorities in the member states, which currently operate different systems, some still based on paper documents. In January 2008 a decision on a paperless environment for customs and trade was adopted jointly by the

<sup>250</sup> Council Act of 26 July 1995, drawing up the Convention on the Use of Information Technology for Customs Purposes (CIS), *Official Journal of the European Communities*, C 316, 27 Nov. 1995, pp. 33–47. The convention will enter into force when it has been ratified by all EU member states. The member states that have already ratified it apply its provisions.

<sup>251</sup> Naples I Convention (note 248).

<sup>252</sup> Council Resolution of 5 Dec. 2003, on creating a simple and paperless environment for customs and trade, *Official Journal of the European Communities*, C 305, 16 Dec. 2003, p. 1.

European Parliament and the Council.<sup>253</sup> While the Modernized Customs Code provides the legal basis of the e-Customs initiative, the decision sets out, among other things, the initiative's aims and 'identifies the systems to be developed and the time-limits to make them operational, the respective responsibilities and tasks of the Commission and the Member states and the coordination and monitoring process'.<sup>254</sup> The e-Customs system is expected to be operational in all member states by mid-2009.

As part of e-Customs, the Commission has requested all member states to set up systems enabling them to share export control-related information electronically with other member states. The idea is to establish a common system, the Export Control System (ECS), by which member states' customs authorities will be able to access information from other member states, such as the results of inspections of export consignments and confirmation that a particular consignment has left the EU. By 1 July 2009 member states are expected to have established procedures for sending electronic notifications to another member state that a consignment is heading for its territory and a fully integrated system for dealing with pre-departure declarations. The ECS is intended as much for facilitating the exchange of fiscal data as it is for addressing safety or security concerns.

The Commission has further proposed that the EU improve its cooperation and consultation with the business community in customs matters; update its customs-related training, including a focus on supporting business compliance efforts; and ensure appropriate Community representation in international forums dealing with customs-related issues, such as the World Customs Organization, the World Trade Organization and the Group of Seven (G7), in order to improve cooperation between customs administrations.<sup>255</sup>

<sup>253</sup> Decision 70/2008/EC of the European Parliament and Council of the European Union of 15 Jan. 2008, on a paperless environment for customs and trade, *Official Journal of the European Communities*, L 23, 26 Jan. 2008, p. 21.

<sup>254</sup> European Commission, 'Modernised Community Customs Code: frequently asked questions', Press release Memo/08/101, Brussels, 19 Feb. 2008, <[http://europa.eu/press-room/index\\_en.htm](http://europa.eu/press-room/index_en.htm)>.

<sup>255</sup> European Commission, 'Customs: Commission proposes a new strategy', Press release IP/01/219, Brussels, 16 Feb. 2001.

### III. Prosecution and criminal justice cooperation

#### **Eurojust**

Recognizing the need to support states' compliance with EU legislation, the 1999 Tampere European Council took a significant step towards enhancing cooperation between the authorities of the member states that deal with investigation and prosecution of serious cross-border and organized crime by deciding to establish Eurojust.<sup>256</sup> Eurojust is a team of senior magistrates, prosecutors, judges and other legal experts seconded from EU member states. It became operational in 2002 and is based in The Hague. Its current powers are listed in the TEU.<sup>257</sup> Eurojust's main function is to respond to requests for assistance by member states. It is also entitled to request a member state to open an investigation, but such a request is currently not binding on the states.

Eurojust has 27 national desk officers, one appointed by each member state. It is the first permanent international network of judicial authorities to be established anywhere in the world. Like Europol, Eurojust does not have executive powers; its main function is to assist member states on request but also to host meetings between investigators and prosecutors from different states to deal with individual cases, strategic issues and specific types of criminality. As part of its mission to coordinate judicial contacts between the member states, Eurojust formed the European Judicial Network in Civil and Commercial Matters (EJN).<sup>258</sup> The EJN's purpose is to assist national judges and prosecutors in carrying out cross-border investigations and prosecutions by improving judicial cooperation on cross-border crimes.<sup>259</sup>

Eurojust may be given additional tasks in the future. The Lisbon Treaty states that Eurojust should be able to: (a) initiate criminal investigations, taking due account of national rules; (b) propose to national authorities that prosecutions be initiated (a competence

<sup>256</sup> European Parliament, Presidency conclusions, Tampere European Council, 15–16 Oct. 1999, <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)>, para. 46. On the Tampere Council see chapter 3, section II, in this volume.

<sup>257</sup> Treaty on European Union (note 80), Article 31.

<sup>258</sup> Council Joint Action 98/428/JHA of 29 June 1998, on the creation of a European Judicial Network, *Official Journal of the European Communities*, L 191, 7 July 1998.

<sup>259</sup> See the EJN website, <<http://ec.europa.eu/civiljustice/>>.

the agency already has); and (c) coordinate investigations and prosecutions being pursued by the competent authorities.<sup>260</sup> However, Eurojust's operating mandate would be determined by the European Parliament and the Council. In August 2007 the European Justice Commissioner, Franco Frattini, expressed an ambition to boost the powers of Eurojust even further: 'Once the treaty is adopted and enters into force, we will start talking about Eurojust having the power and the responsibility of initiating an investigation, not only coordinating it'.<sup>261</sup> Some national desk officers at Eurojust have requested access to domestic criminal records and other such resources that could help them to coordinate investigations and prosecutions in the EU member states.<sup>262</sup>

The mutual recognition of judicial decisions—meaning that decisions taken by a judicial authority in one EU member state are recognized and, where necessary, enforced by another member state—is essential for maintaining the credibility of Community legislation. The principle of mutual recognition applies to final decisions under criminal law. These include decisions by courts, including certain administrative tribunals, the outcome of mediation procedures, and agreements between suspects and prosecution services. If one member state does not respect the legal measures taken by another member state to enforce Community legislation, this could undermine the aim of common legislation.

In 2001 the EU adopted a programme of measures to implement the principle of mutual recognition in criminal matters.<sup>263</sup> Implementing this programme will be challenging. Traditionally, judicial cooperation has been defined as an intergovernmental relation-

<sup>260</sup> Treaty of Lisbon (note 75), Article 85 TFEU (ex Article 31 TEU). This suggestion was carried over from Title III, Article 273, of the now-defunct Constitutional Treaty (note 76).

<sup>261</sup> Goldirova, R., 'Brussels eyes single European public prosecutor', *EU Observer*, 1 Aug. 2007, <<http://euobserver.com/9/24556>>.

<sup>262</sup> See e.g. Klouckova, S., 'Eurojust contact point in the Czech Republic in Rome, Status of Eurojust national members' access to national judicial registers', Presentation, Rome, 4 Nov. 2003, <[http://www.giustizia.it/pol\\_internaz/coop/klouckova\\_en.htm](http://www.giustizia.it/pol_internaz/coop/klouckova_en.htm)>. The idea of establishing a European criminal record has been mooted but has not received universal support from the member states. See e.g. House of Lords, European Union Committee, *Judicial Cooperation in the EU: The Role of Eurojust*, Report with evidence, HL Paper 138 (The Stationery Office: London, 21 July 2004), p. 37.

<sup>263</sup> European Council, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *Official Journal of the European Communities*, C 12, 15 Jan. 2001, pp. 10–22.



ship, with one sovereign state submitting a request to another sovereign state, which then decides if it will comply with the request. The programme sets out to determine the priorities for establishing a genuine European law enforcement area, with the aim of facilitating mutual recognition at all stages of criminal proceedings. There has so far been no agreement on, for example, whether mutual recognition should be restricted to serious crime, whether the requirement of dual (or double) criminality—that is, that the behaviour is a criminal offence in both states—should be kept or whether sovereignty or other essential interests of member states should remain as grounds for refusing recognition.<sup>264</sup>

Other disputed subjects relate to the principle of *ne bis in idem*, or double jeopardy. According to this legal principle, once a person has been the subject of a decision on the facts in a criminal case, he or she should not be the subject of further decisions on the same matter. The application of the principle in the EU member states raises several questions of interpretation, not least because it is not defined in the same way by the various international legal instruments that refer to it.<sup>265</sup>

The subject of dispute at state level concerns which member state is most suitable to prosecute a case when two or more member states are competent to take the case to trial. States that apply the mandatory prosecution principle—the rule that the prosecution service must prosecute every offence that comes to its knowledge—have the greatest difficulty in adapting to the *ne bis in idem* principle. The Commission Directorate-General for Justice, Freedom and Security published a Green Paper on the *ne bis in idem* issue in 2005.<sup>266</sup> The drafters of the Green Paper suggest that a two-stage approach should be used to address the *ne bis in idem* question. In the first stage, standard multilingual forms should be introduced to enable practitioners in each member state to obtain

<sup>264</sup> On each of these topics see European Commission, 'Recognition of decisions in criminal matters: strengthening mutual trust', 23 Oct. 2005, <<http://europa.eu/scadplus/leg/en/lvb/l16001.htm>>. On dual criminality see below.

<sup>265</sup> The *ne bis in idem* principle is enshrined in Article 50 of the Charter of Fundamental Rights of the European Union and is laid down in the European Human Rights Convention (ECHR). The ECHR's provisions will become binding EU law if the Lisbon Treaty is adopted.

<sup>266</sup> European Commission, Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696, 23 Dec. 2005.

information from the authorities of other member states about whether a person they are dealing with has a criminal record. In the second stage, a genuine European criminal register would be created. This register would be accessible electronically and would thus enable the investigating authorities to check directly whether the person in question is or has been the subject of any other criminal proceedings.

### **Mutual assistance arrangements**

In 2000 the EU member states signed the Convention on Mutual Assistance in Criminal Matters.<sup>267</sup> In practical terms, the convention is meant to facilitate fast and efficient mutual assistance between the police, customs authorities and courts of member states that is compatible with the basic principles of their national laws. In other words, it does not require that all national implementation laws should be identical or that the division of competences between enforcement agencies be the same. Hence, the convention allows member states to adopt enforcement systems that are adapted to their existing legal and political systems, industrial structures, geographical locations, and so on. The convention is an extension of two previous frameworks for cooperation: the 1957 European Convention on Extradition and the 1977 European Convention on the Suppression of Terrorism.<sup>268</sup> The 2000 convention introduced a new, simplified scheme for extradition for prosecution and the execution of sentences.

The Council has initiated additional incentives to facilitate bilateral cooperation in judicial areas. For example, it has made several framework decisions on harmonizing judicial decisions in the member states where one state may request assistance from

<sup>267</sup> The Convention on Mutual Assistance in Criminal Matters between the Member states of the European Union is included in a Council Act of 29 May 2000, *Official Journal of the European Communities*, C 197, 12 July 2000, pp. 3–23. The convention entered into force on 23 Aug. 2005. It should not be confused with the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its 1978 Additional Protocol, which is in force in all EU member states but was judged to be inadequate for the purpose of implementing the objectives of EU cooperation in the area of justice and home affairs.

<sup>268</sup> The European Convention on Extradition was opened for signature on 13 Dec. 1957 and entered into force on 18 Apr. 1960. The European Convention on the Suppression of Terrorism was opened for signature on 27 Jan. 1977 and entered into force on 4 Aug. 1978. Both conventions are available at <<http://conventions.coe.int/>>.

another in connection with criminal proceedings relating to offences or infringements for which a legal person may be held liable in the requesting member state.<sup>269</sup> The executing state must provide the assistance as quickly as possible.

An example of a Council framework decision aimed at initiating cooperation on justice and home affairs between member states is that on the execution in the EU of orders freezing property or evidence.<sup>270</sup> It obliges member states to recognize and execute a freezing order that has been issued by a legal authority of another member state in criminal proceedings. This could help judicial authorities secure evidence and property on the territory of another member state that otherwise would not be accessible to them. The decision lists the offences it applies to, which include illicit trafficking in weapons, munitions and explosives; however, it does not explicitly mention trafficking in dual-use goods.<sup>271</sup> Another example of a move to initiate cooperation is a 2005 framework decision on the application of the principle of mutual recognition of financial penalties.<sup>272</sup>

### **The European arrest warrant**

The EAW has been in force since 2004 and replaces all former regulations on extradition procedures—which tended to lead to lengthy extradition processes—by introducing a common arrest warrant.<sup>273</sup> The EAW is defined in the framework decision as any judicial decision by a member state with a view to the arrest or surrender by another member state of a requested person for the

<sup>269</sup> European Commission, Directorate-General for Justice, Freedom and Security, 'Mutual recognition in criminal matters', Dec. 2005, <[http://ec.europa.eu/justice\\_home/fsj/criminal/recognition/fsj\\_criminal\\_recognition\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/recognition/fsj_criminal_recognition_en.htm)>.

<sup>270</sup> Council Framework Decision 2003/577/JHA of 22 July 2003, on the execution in the European Union of orders freezing property or evidence, *Official Journal of the European Union*, L 196, 2 Aug. 2003, pp. 45–55.

<sup>271</sup> Council Framework Decision 2003/577/JHA (note 270), Article 3.

<sup>272</sup> Council Framework Decision 2005/214/JHA of 24 Feb. 2005, on the application of the principle of mutual recognition to financial penalties, *Official Journal of the European Union*, L 76, 22 Mar. 2005, pp. 16–30.

<sup>273</sup> The legal basis for the EAW is Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member states, *Official Journal of the European Communities*, L 190, 18 July 2002, pp. 1–18. See European Commission, 'European Arrest Warrant', 7 Apr. 2006, <<http://europa.eu/scadplus/leg/en/lvb/l33167.htm>>.

purpose of conducting a criminal prosecution, executing custodial sentences or executing a detention order.<sup>274</sup> The person to be extradited must be facing a sentence greater than one year's imprisonment in the state issuing the warrant in order for the EAW rules to apply. Since the sanctions applied in member states for dual-use export violations range from 15 years' imprisonment to minor fines, the decision to issue an EAW in such a case will depend on the sanctions applied in the warrant-issuing state.

Under normal circumstances, one member state may reject an application for extradition if the offence being investigated in the requesting member state does not constitute a criminal offence under its own legislation—the principle of dual criminality. However, this exception is naturally not valid if the EAW procedures are applicable. The principle of dual criminality may, however, apply if the possible sanctions in the requesting state are much more severe than those in the executing state. A hypothetical scenario in which the principle of dual criminality could be invoked is if Germany requested the extradition of an export control offender from Ireland. Ireland could refuse this request based on the fact that Irish law stipulates a maximum penalty of one year's imprisonment for this offence, while in Germany the maximum sentence is 15 years.<sup>275</sup>

The framework decision on the EAW waives the dual criminality requirement for 32 categories of crime—including participation in a criminal organization and terrorism—that reach a certain level of gravity and could lead to at least a maximum penalty of three years in prison.<sup>276</sup> Whether or not violations of the dual-use export legislation are exempted from the requirement depends on the interpretation of 'terrorism' and 'participation in a criminal organization'. Coming to terms with the meaning of these concepts and

<sup>274</sup> Council Framework Decision 2002/584/JHA (note 273), Article 1(1).

<sup>275</sup> Fifteen years' imprisonment would be an extreme penalty for a dual-use export control violation. It would be applied only in the event that a German prosecutor could prove that an exporter had the intent to proliferate WMD. An Irish prosecutor could use alternative legislation unrelated to Irish export control law to prosecute such a severe offence and apply a stricter penalty.

<sup>276</sup> Other categories of crime that are exempted from the principle of dual criminality include trafficking in humans, sexual abuse of children, illegal trade in narcotics, fraud, money laundering, crimes related to the environment, murder, kidnapping, rape, arson and assault. Council Framework Decision 2002/584/JHA (note 273), Article 2.

with conflicting national criminal laws remains a significant challenge for the EU member states.

#### IV. Cooperation and non-proliferation

This section addresses the question of how EU cooperation, particularly Eurojust and Europol, currently contributes to combat WMD-related offences. Neither agency has an explicit mandate related to control of dual-use goods or WMD non-proliferation in general, but the mandates of both organizations are related to preventing and combating transnational organized crime, including terrorism.<sup>277</sup> It should be noted that Eurojust's competences are tied to Europol's and thus cover all types of crimes and other offences covered by the Europol Convention.<sup>278</sup> While Europol has an explicit mandate to support the member states independently by collecting and analysing intelligence material, Eurojust operates only at the request of the member states.

Although the primary task of both agencies is to combat organized crime, the concept of organized crime remains somewhat vague. In a joint action of 1998, the Council attempted a definition of 'criminal organization':

a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.<sup>279</sup>

However, the Council limited the definition's application to that particular act.<sup>280</sup> A problem with such a definition is that, in the

<sup>277</sup> Europol Convention (note 133), Article 2.

<sup>278</sup> Council Decision 2002/187/JHA (note 126), Article 4.

<sup>279</sup> Council Joint Action 98/733/JHA of 21 Dec. 1998, on making it a criminal offence to participate in a criminal organization in the EU member states of the European Union, *Official Journal of the European Communities*, L 351, 29 Dec. 1998, pp. 1-2, Article 1.

<sup>280</sup> Note, however, that Eurojust's competences related to organized crime refer to the definition in Council Joint Action 98/733/JHA (note 279). Council Decision 2002/187/JHA (note 126), Article 4(1)(b).

words of a 2000 EU strategy on organized crime, ‘Organised criminal activity is dynamic by nature. It need not be confined to rigid structures.’<sup>281</sup> Similarly, Europol and, by extension, Eurojust have mandates related to combating terrorism—although the Council did not define ‘terrorist offences’ until June 2002, seven years after the Europol Convention was adopted.<sup>282</sup>

In 2005 the Commission submitted a proposal for a Council framework decision on combating organized crime to supersede the 1998 joint action.<sup>283</sup> The proposal argued that framework decisions—which had only been available since the Treaty of Amsterdam came into force in 1999—were the most appropriate instruments when harmonization of offences and penalties specified in national criminal law was needed in this area under the third pillar. This ‘reformatting’ of the 1998 joint action was meant to ‘make it possible to take a similar approach to criminal groups, whether they are terrorist organisations or organised crime’.<sup>284</sup> The proposal also included some substantive innovations, including a simplified definition of ‘criminal organization’.<sup>285</sup>

According to Europol officials, investigating illegal transfers of dual-use goods falls within the agency’s mandate to combat trafficking in goods—under the umbrella offence of ‘organized crime’ or ‘terrorist offences’. However, to date the agency has no experience of dealing with offences related to dual-use goods. None of Europol’s publicly available reports on organized crime or its European organized crime threat assessments refer to trafficking in dual-use goods.<sup>286</sup>

<sup>281</sup> ‘The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium’, Act adopted pursuant to Title VI of the Treaty on European Union, *Official Journal of the European Union*, C 124, 3 May 2000, p. 1.

<sup>282</sup> Council Framework Decision 2002/475/JHA of 13 June 2002, on combating terrorism, *Official Journal of the European Communities*, L 164, 22 June 2002, pp. 3–7. See also European Commission, Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, COM(2007) final, Brussels, 6 Nov. 2007.

<sup>283</sup> European Commission, Proposal for a Council framework decision on the fight against organised crime, COM(2005) 6 final, 2005/0003/CNS, Brussels, 19 Jan. 2005.

<sup>284</sup> European Commission (note 283), Explanatory memorandum.

<sup>285</sup> European Commission (note 283), Article 1.

<sup>286</sup> Europol’s publications, including the organized crime threat assessments, are available at the agency’s website, <<http://www.europol.europa.eu/>>.

Eurojust similarly has little or no experience in the field of coordinating cases related to trafficking of dual-use goods or to NBC terrorism. Although Eurojust officials confirm that these offences falls within the agency's mandate, they claim that such cases are difficult to coordinate because the laws in the member states vary greatly, the EC Dual-use Regulation is complex and technical, and Eurojust has little awareness of the international approach in this field.<sup>287</sup>

The definition of 'criminal organization' in the 1998 joint action includes a specific stipulation whereby the offence concerned must be punishable by deprivation of liberty or a detention order of a maximum of at least four years. This means that the penalties applied in the national legislation of member states again play a crucial role: if the proposed framework decision were to enter into force, the penalties applied in the member states would determine whether the crime fell within the mandates of Europol or Eurojust.

As regards terrorist offences, the 2002 Council Framework Decision on Combating Terrorism recognizes the manufacture and supply of weaponized NBC materials as terrorist offences.<sup>288</sup> It also determines that the acquisition and development of biological and chemical weapons (the only weapons whose use is subject to prohibition) may be referred to as terrorist offences if they are intended to cause significant damage. Consequently, the illegal export of dual-use goods that could be used to manufacture biological or chemical weapons is included in the definition of terrorism if the exporter has the intent to proliferate such weapons. However, it is unclear whether it is sufficient that the exporter is aware of the recipient's intent to proliferate.

In this interpretation of terrorist offences, both Europol and Eurojust have the mandate to investigate violations by, and coordinate national prosecutions of, those exporters suspected of exporting dual-use goods for purposes of terrorism. Another implication of this interpretation is that the EU's strategic objective to 'maximise capacity within EU bodies and Member states to detect, investigate and prosecute terrorists and prevent

<sup>287</sup> Officials of Eurojust, Interviews with the author, May and Sep. 2007.

<sup>288</sup> Council Framework Decision 2002/475/JHA (note 282).

terrorist attacks' could apply to export violations.<sup>289</sup> The subsidiary objectives under this strategic objective are to:

- Ensure optimum and effective use of existing EU bodies such as Europol, Eurojust and the Police Chiefs Task Force
- Improve mechanisms for cooperation for the sharing of expertise on protective, investigative and preventive security policies between police and security services
- Promote effective, systematic collaboration in intelligence exchange between Member states
- Enhance the capacity of appropriate EU bodies in the preparation of intelligence assessments of all aspects of the terrorist threat, with a closer linkage to EU policymaking
- Work to identify, disrupt and dismantle arrangements for supply of weapons to terrorists.<sup>290</sup>

In sum, EU cooperation in the prevention of terrorism is extensive, and law enforcement and judicial cooperation are highly developed. While the discussion in this section applies to the illegal export of items to non-state actors who may intend to use them in committing terrorist offences, there has been only one known case of a terrorism offence involving a WMD-class biological weapon: the attack on the Tokyo underground railway system in 1995. However, three non-nuclear weapon states are known to have conducted nuclear test explosions since 1998—India, Pakistan and North Korea—while the US Government and several non-government experts suspect that Iran has initiated a covert nuclear weapon programme.<sup>291</sup> The EU should therefore consider ways of making better use of its bodies to coordinate investigations of suspected illegal deliveries of dual-use goods to state actors, using those agencies that already operate in this field.

<sup>289</sup> European Council (note 205), Section 8.

<sup>290</sup> European Council (note 205), Annex I, objective 3.

<sup>291</sup> India conducted a series of tests in 1998, although its first nuclear test explosion was in 1974. Pakistan conducted its first test explosions in 1998. North Korea carried out its first test explosion in 2006. See Fedchenko, V., and Ferm Hellgren, R., 'Nuclear explosions, 1945–2006', *SIPRI Yearbook 2007* (note 44), pp. 552–57.



## 6. Case studies

This chapter presents accounts of the detection, investigation and prosecution of crimes involving dual-use goods in Germany, Sweden, the Netherlands and the UK. The first three involved export control violations. These cases were chosen to illustrate, among other things, the workings of different export control systems in the EU member states as well as the practical implications of the various acts under which such offences are prosecuted. The fourth case, from the UK, involved the suspected production of a controlled biological and chemical substance from goods available on the open market and shows how anti-terrorism legislation can be used in preventing and prosecuting WMD-related crimes. Each account is followed by a description of the legislative framework and enforcement system for export controls on dual-use goods in the selected member state.

### I. Germany

A relatively large number of illegal dual-use export cases have been prosecuted in Germany, indicating that several German companies have potentially contributed to WMD proliferation. While some companies—or rather their managers—have evidently not been aware of the final destination of their goods, others have known full well whom they were supplying and to what use the goods might be put, apparently tempted by the large sums offered by proliferators. In considering Germany's record in this area, it should be born in mind that Germany has one of the largest technology industrial sectors in the world. The number of prosecutions also reflects the fact that Germany has come further than many countries inside and outside Europe in its enforcement of export controls on dual-use goods. This case study describes a long and detailed investigation into an attempted export of dual-use goods to North Korea. As can be seen in the survey of the German export control system in the second part of the case study, the case led directly to a thorough revision of the German export control legislation.

**The *Ville de Virgo* case**<sup>292</sup>

In May 2004 a German citizen, Hans-Werner Truppel, was convicted of attempting to export 22 tonnes of aluminium tubes to North Korea, in defiance of a catch-all warning. The tubes, which were made of an exceptionally light and strong alloy, could be used in the manufacture of a range of commercial products as well as in the construction of gas ultra-centrifuges for uranium enrichment. North Korea was known to have been trying for some time to seek equipment, parts and technology in Europe for its nuclear programme, employing often elaborate methods, mainly involving front companies, to disguise its activities. Throughout the second half of 2002 European and US intelligence agencies had received signals that North Korea was attempting to obtain around 220 tonnes of aluminium tubes of the type that Truppel sought to export. In addition, German authorities issued a warning in 2002 that North Korean agents were trying to obtain 'sensitive goods' using front companies or third countries.<sup>293</sup>

Truppel ran a company, Optronic GmbH & Co, based near Munich, which traded in optic and electronic equipment. Through his work Truppel came into contact with a North Korean, Jun Hozin, in the 1980s. Jun had previously represented North Korea in the IAEA and was an expert in nuclear technology. Truppel and Jun established their first business relationship in 2000. Truppel and Jun at first traded in non-sensitive goods and Truppel benefited from Jun's Asian business contacts.

In May 2002 Jun ordered 214 aluminium tubes from Truppel. On the export declaration, Truppel identified the consignee as a company in North Korea, Namchogang (NCG) Corp. Truppel ordered the tubes from a German company, Jacob Bek GmbH, which acquired the tubes from another German company, Krefal Handels GmbH, the German representative of British Aluminium Tubes Ltd, the manufacturer. Since the British firm could not

<sup>292</sup> This account is based on District Court of Stuttgart, Case 10 KLs 141 Js 28271/03, Judgement of 28 May 2004; and information from Klaus-Peter Ricke, former head of the Export Control/Investigation section of the German Customs Criminological Office.

<sup>293</sup> Warrick, J., 'N. Korea shops stealthily for nuclear arms gear: front companies step up efforts in European market', *Washington Post*, 15 Aug. 2003.

produce all the tubes at once, the order was divided into batches. Truppel paid €80 000 for the first batch, which was transported to the premises of Jacob Bek in September 2002.

A few days after the first delivery, Truppel presented export papers to the local customs office in Aalen. The declared final destination was Nampo in North Korea. That day, Truppel had received a fax from Jun stating that the tubes were in fact destined for a project in China. Truppel did not mention any of the new information to the customs officers. The customs officer on duty had known Truppel for 25 years and registered the export without further questions. The export registration documents were then passed to the cargo company Müller + Partner GmbH, which had been engaged to transport the consignment to North Korea.

At around this time, the German intelligence agency, the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV), was informed by a foreign intelligence service that 20 tonnes of aluminium tubes were to be sent by Optronic to an unidentified party in North Korea. The BfV took immediate action, contacting the Customs Criminological Office (Zollkriminalamt, ZKA). The German licensing agency, BAFA, was also contacted.

Unable to discover whether the export had been registered by means of its export control database, the ZKA contacted the Aalen customs office and told it not to register the export of the consignment. On learning that the export had already been registered, the ZKA ordered the local customs investigation office in Stuttgart to locate the tubes were and issue a temporary export prohibition. An officer visited Optronic, explained the circumstances and told Truppel that he should not proceed with the export until BAFA had decided whether the export would require a licence, in accordance with Article 4 of the EC Dual-use Regulation, the catch-all clause.<sup>294</sup> Truppel maintained during this interview that the tubes were for an optical end-use. Stuttgart customs investigators contacted Jacob Bek to establish that the tubes were still there.

Truppel contacted BAFA several times over the coming months asking whether any decision had been made about the licensing

<sup>294</sup> On the catch-all clause see chapter 4, section II, and the glossary in this volume.

requirement. During this time, Truppel submitted an end-use certificate, including a signed statement, provided by Jun, purportedly from a representative of a Chinese company, Shenyang Aircraft Industry Group Import & Export Co., which stated that the tubes were to be used ‘in production activity of our group’.<sup>295</sup> Fearing that BAFA would still not authorize the export, Truppel began to look for alternative buyers for the tubes in the coming weeks and months. In February 2003, after lengthy inter-agency consultation and verification processes, BAFA issued a catch-all warning stating that a licence was required to export the tubes to China. The BAFA officials denied the export on the grounds that tubes of this type were being sought by the governments of Iran and North Korea, possibly for their nuclear programmes. BAFA was sceptical about the purported end-use and end-user in China and still believed that North Korea was the intended destination of the tubes. Jakob Bek was informed about the decision and undertook to inform the customs investigation office if anything happened to the tubes.

Despite receiving the catch-all warning, Truppel proceeded with the export, striking a deal with a Hamburg-based exporting company, Delta-Trading GmbH, which was accredited to use simplified customs clearance procedures.<sup>296</sup> Truppel informed the company manager of the potential legal consequences of exporting the goods. Nevertheless, the manager agreed to declare the goods to German customs in Hamburg; transport the tubes from Jacob Bek’s premises to Hamburg and stow them in a shipping container; and transport them to the Chinese port of Dalian. The company charged Truppel €5500 plus VAT for its services. In the customs declaration, Shenyang Aircraft Industries was once again named as the purchaser, with the same proposed end-use. On the simplified procedure declaration form, Delta-Trading’s manager was identified as the owner and seller—and thus as the exporter—of the goods. The tubes were loaded onto the French container ship *Ville de Virgo*, which left Hamburg for Dalian on 3 April 2003.

Four days later, the ZKA contacted the Stuttgart Customs Criminological Office for an update on the situation of the tubes.

<sup>295</sup> Truppel sent this end-user certificate to BAFA by fax on 8 Oct. 2002.

<sup>296</sup> On simplified procedures see the glossary in this volume.

The office replied that Jacob Bek had released the tubes, which were assumed to be on their way back to the UK. On discovering that the tubes were on board the *Ville de Virgo*, which had already left German territorial waters, the ZKA immediately passed the case to the public prosecutor's office in Stuttgart, which ordered the Stuttgart customs criminological office to initiate a criminal investigation. The premises of Optronic, Delta-Trading, Jacob Bek and Krefal were searched and Truppel was arrested.

Meanwhile, an emergency conference was called of all the national authorities in the area of export control to work out how to prevent the consignment from reaching China. In this case the German authorities were fortunate to be dealing with the French Government, which allowed the ship to be intercepted, on 12 April, during an unscheduled stop at the Egyptian port of Damiette. The tubes were returned to Hamburg, where they were impounded by customs investigation officers.

The case opened in the Stuttgart District Court in October 2003, following a lengthy investigation. Both Truppel and the manager of Delta-Trading were charged. The prosecutor's case stated that the intended final destination of the goods had always been North Korea. Truppel was charged with and convicted for illegally exporting dual-use items to a country of proliferation concern in defiance of a licence requirement.<sup>297</sup> He was further charged with and convicted for attempting to contribute to the construction of a nuclear weapon.<sup>298</sup> Truppel was sentenced to four years' imprisonment. In sentencing, the judge took into account the criterion that Truppel's activities could have seriously endangered the peaceful

<sup>297</sup> This charge was under the Foreign Trade and Payments Act (note 193), Section 33(4), in conjunction with Section 70(5)(a)(2) of the Regulation implementing the Foreign Trade and Payments Act (Außenwirtschaftsverordnung, AWW) of 18 Dec. 1986 and Article 4(1) of the EC Dual-use Regulation (the catch-all clause).

<sup>298</sup> This charge was under Section 19 in conjunction with Section 1(1) of the War Weapons Control Act (Kriegswaffenkontrollgesetz, KWKG) of 20 Apr. 1961, BGBl I, 1961, p. 444, as amended by Section 2 of the Act Implementing the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 6 July 1998, BGBl I, 1998, p. 1778. The KWKG was established in accordance with Section 26(2), of the Constitution of the Federal Republic of Germany: 'Weapons designed for warfare may not be manufactured, transported, or marketed except with the permission of the Government. Details are regulated by a federal statute.' An unofficial translation of the KWKG is available at <<http://www.sipri.org/contents/expcon/kwkg.html>>.

coexistence of states and disturbed Germany's foreign relations.<sup>299</sup> The manager of Delta-Trading was convicted of abetting the crime and sentenced to 15 months' imprisonment.<sup>300</sup> Neither of the defendants appealed against the verdicts.

*Reflections on the case*

Although German export control laws and the overall German system for law enforcement had both already been extensively revised since the 1990s, the *Ville de Virgo* case highlights some deficiencies that still constrain officers trying to enforce the German laws governing export controls on dual-use goods. The first problem in the case came when the local customs office in Aalen approved Truppel's first application for export clearance for the aluminium tubes without asking important questions, even though this was the first time that Truppel had tried to export such items. Evidently, the customs officer in Aalen put too much trust in Truppel's export compliance record. However, there may also have been inadequate sharing of information regarding risks with front-line customs officers. On the more positive side, good cooperation between foreign and German intelligence services clearly contributed to the detection of the procurement activity.

More than four months elapsed between BAFA issuing the temporary export prohibition in October 2002 and issuing the full catch-all notification in February 2003. This was largely due to the difficulty of establishing the extent of the proliferation risk from the export of the tubes. During this time a significant amount of Optronic's capital was tied up in the tubes. While it does not excuse Truppel's crime, he cited this delay as a factor in his willingness to take risks in order to proceed with the export.

Another problem in the case is the lack of vigilance that allowed several days to pass before the authorities realized that the tubes had been moved from the premises of Jacob Bek to Hamburg. In 2002 there was no German law allowing the preventive confiscation of the tubes while BAFA reached its decision. However, the

<sup>299</sup> Foreign Trade and Payments Act (note 193), Section 34(2); and War Weapons Control Act (note 300), Section 19(2).

<sup>300</sup> The manager was convicted under Section 27 and Section 28(1), of the German Penal Code (Strafgesetzbuch, StGB) of 15 May 1871, as amended by the Revision of the Penal Code of 13 Nov. 1998, BGBl I, 1998, p. 3322.

customs authorities could have checked more regularly with Jacob Bek that the items remained on its premises. This illustrates how, in the absence of specific legislation—in this case allowing preventive confiscation—there are usually no institutional routines or standards to verify facts that could be of importance for an investigation. In response to this aspect of the *Ville de Virgo* case, a law permitting confiscation in order to prevent an illegal export was adopted in 2007 and was used twice in that year.<sup>301</sup>

The *Ville de Virgo* case also illustrates the potential for abuse of the simplified export procedures provided for in the Community Customs Code.<sup>302</sup> By using simplified procedures, Delta-Trading was able to act as a cover for Truppel's illegal export—Truppel's name appeared nowhere on the export declaration. This fact caused some initial difficulties for the investigators and prosecutors, who needed to establish the link between Truppel and the illegal export. In the absence of an additional contract transferring the right of disposal from Truppel to Delta-Trading or its representatives, Truppel legally remained the exporter.<sup>303</sup>

It is hard to understand why Delta-Trading should have put so much at risk—including its right to use simplified procedures—for a relatively small sum of money. It perhaps indicates that abuse of simplified procedures is fairly commonplace and that there are serious weaknesses in the system that need to be addressed. An alternative explanation is that Truppel and Delta-Trading were hoping that they would later be able to export the second consignment of aluminium tubes. If Truppel had known that he was involved in nuclear proliferation activities, one would assume that he would demand a large payment for the risks he took. However, it could not be established during the trial that Truppel had any intent to proliferate WMD. According to Truppel's defence lawyer,

<sup>301</sup> The new law was introduced in Section 32b of the Zollfahndungsdienstgesetz (Customs Investigation Service Act) by the Act amending the Customs Investigation Service Act and other laws (Gesetz zur Änderung des Zollfahndungsdienstgesetzes und anderer Gesetze) of 12 June 2007, BGBl I, 2007, p. 1037, 12 June 2007.

<sup>302</sup> On the Community Customs Code see chapter 4, section II, in this volume. On simplified procedures see the glossary in this volume.

<sup>303</sup> Article 788 of the Community Customs Code (note 203) states that the exporter is the person on whose behalf the export declaration is made and who is the owner of the goods or has a similar right of disposal. For more on the definition of 'exporter' see the glossary in this volume.

Delta-Trading's fee represented half the entire profit Truppel was expecting from the deal. Instead, his main motive in arranging the export through Delta-Trading was to recoup the money that he had already paid for the tubes.<sup>304</sup>

Finally, the fact that the aluminium tubes had not yet been added to the annex lists of the EC Dual-use Regulation by late 2002 despite several warnings from both European and US intelligence services earlier in the year, perhaps reflects a lack of responsiveness in the current export control system. If the items had been listed, BAFA could have informed Truppel immediately in October 2002 that an export licence was needed. However, the case reflects the pivotal importance of the catch-all instrument.

### **Investigating and prosecuting dual-use export control violations in Germany**

#### *Export control legislation governing dual-use goods*

In Germany illegal exports of dual-use items can be penalized under the 1961 Foreign Trade and Payments Act, the 1961 War Weapons Control Act (Kriegswaffenkontrollgesetz, KWKG) and the 1871 German Penal Code.<sup>305</sup> Prosecutors are also referred to case law.

Section 34 of the AWG provides for criminal penalties for the unlicensed export or transfer of any item listed in the national export control list.<sup>306</sup> It further provides for criminal penalties for breaches of economic sanctions imposed by the UN Security Council or by the EU Council in the domain of the CFSP (embargo violations).<sup>307</sup> Other violations of national or EU export control ordinances, whether intentional or unintentional, are only subject to administrative penalties unless the act is deemed likely to threaten Germany's external security; the peaceful coexistence of nations; and Germany's foreign relations, in which case criminal penalties

<sup>304</sup> Warrick, J., 'Trafficking in shadows: North Korea shops globe for nuclear-arms gear', *Washington Post*, 18 Aug. 2003.

<sup>305</sup> Foreign Trade and Payments Act (note 193); War Weapons Control Act (note 298); and German Penal Code (note 300), as amended on 31 Oct. 2008, BGBl I, 2008, p. 2149.

<sup>306</sup> Foreign Trade and Payments Act (note 193), Section 34(1) and (2).

<sup>307</sup> Foreign Trade and Payments Act (note 193), Section 34(4). On sanctions under the CFSP see note 93.



may be applied.<sup>308</sup> One of these prerequisites must have been substantially fulfilled for such an offence to be considered criminal.

In principle, to be convicted under Section 34 the offender must have acted with intent. Violations due to negligence may be penalized only under special circumstances and can only lead to mitigated penalties.<sup>309</sup> In the European context, the AWG is unique in its inclusion of liability for the suppliers of illegally exported goods. If it can be proved that a supplier (who does not have to be the exporter) 'encouraged the [illegal] export or transfer by providing the goods' the supplier can be penalized.<sup>310</sup>

Offences under paragraph 1 or 2 of Section 34 are punishable by a fine or a prison sentence of up to five years, while offences under paragraph 4 (violations of economic sanctions) are punishable by a prison sentence of between six months and five years. A prison sentence of between 2 and 15 years is applicable if an offence under paragraph 1 or 2 is judged to have 'risked serious detriment' to the external security of the state, 'disturbed the peaceful coexistence between nations' or 'considerably disturbed' Germany's foreign relations.<sup>311</sup> The same penalty is applicable to offenders acting on a professional basis or acting for a criminal organization and under certain other circumstances.<sup>312</sup> Section 35 of the AWG extends the application of Section 34 to German nationals abroad. The penal provisions in Section 34 have been criticized by the judicial community for being unnecessarily complicated.<sup>313</sup>

The provisions of the KWKG are easier to follow. The KWKG can only be applied in cases where someone is suspected of violating either the export laws related to conventional weapons or

<sup>308</sup> Foreign Trade and Payments Act (note 193), Section 33(1) and (4), in conjunction with Section 34(2). On administrative and criminal sanctions see the glossary in this volume.

<sup>309</sup> Foreign Trade and Payments Act (note 193), Section 34(7).

<sup>310</sup> Foreign Trade and Payments Act (note 193), Section 34(3).

<sup>311</sup> These penalties are regulated under Foreign Trade and Payments Act (note 193), Section 34(6) and German Penal Code (note 300), Section 34(2).

<sup>312</sup> Foreign Trade and Payments Act (note 193), Section 34(2).

<sup>313</sup> See e.g. Pottmeyer, K., 'Strafen nach AWG/KWKG—reformbedürftig' [Penalties in the AWG and KWKG: the need for reform], *AW-Prax*, 2/1999, pp. 45–47. 'The penal regulations of the AWG remain [after revision of the law in 2006] extremely complex, specifically because the numerous authorization regulations of the national external economy laws and the EC Dual-use Regulation must be taken into account when applying them.' Ricke, K.-P., 'The prosecution of violation of export laws in Germany', Background paper prepared for SIPRI, Aug. 2006 (SIPRI translation).

those related to the proliferation of WMD. Its provisions relevant to dual-use items are based on the requirement that to be convicted a suspect must—at least passively—have confessed that the exported goods were intended for the construction of conventional weapons or for WMD proliferation. If this cannot be proved, the prosecutor must fall back on the AWG. This division between the two acts reflects the difficulty of proving the intent of an exporter to contribute to the proliferation of WMD. In the *Ville de Virgo* case the judge referred to the KWKG because the prosecutor had reason to suspect that Truppel had the intent to violate the laws against the proliferation of nuclear weapons.<sup>314</sup> An important component of the KWKG is its annex, the War Weapons List, which includes all war weapons that Germany undertakes not to manufacture—that is, NBC weapons.<sup>315</sup>

German case law assists in identifying what constitutes a weapon under the KWKG. There are three prevailing theories. If all parts of a weapon have been exported, the ‘kit’ or ‘IKEA’ theory may be applied. This theory states that an item that is listed in Part B of the War Weapons List remains a weapon of war—and thus requires export authorization—even if it is disassembled, as long as it can be reassembled without extraordinary means or special tools. Judges must interpret what constitute such means and tools. According to the ‘theory of easy assembly’, an item listed in Part B of the War Weapons List that is missing one or more parts could still be considered a weapon and require export authorization if the missing parts can be replaced without extraordinary means and special skills. Once again, the judge must decide what constitute such means and skills. The third theory, usually referred to as the ‘specially constructed as . . .’ theory, states that any item that is intended for military use needs export approval under the conventional weapons licensing procedures and cannot be considered a dual-use or civil-use item. In applying this theory it is necessary to establish the intention behind the original design.<sup>316</sup>

<sup>314</sup> See Section 19(1), of the War Weapons Control Act (note 298). Another relevant case concerned the delivery of a waste gas purification installation for a mustard gas factory in Libya. Stuttgart District Court, Case 6 Kls 144, Js 43314/94, Judgement of 19 June 2001.

<sup>315</sup> War Weapons List (Kriegswaffenliste, KWL), Annex to Section 1(1), of the War Weapons Control Act (note 298).

<sup>316</sup> Federal Supreme Court, Case St 296/95, Judgement of 23 Nov. 1995.

The AWG and the KWKG are complemented by three sets of provisions in the Penal Code: Section 93, defining ‘state secrets’; Section 94, setting out penalties for high treason, which includes communicating state secrets to a foreign power; Section 96 on activities of intelligence service agents; and Section 99, dealing with espionage by German citizens in the service of foreign intelligence services.<sup>317</sup> Since the conclusion of the 1970 Treaty of Almelo between Germany, the Netherlands and the UK, research into technology for the enrichment of uranium through the use of gas ultra-centrifuges has been considered a state secret.<sup>318</sup>

*Detection, investigation and prosecution procedures*

To facilitate the detection of violations, the German customs agencies have at their disposal correlation lists—which correlate the categories of control lists and customs codes—and databases for the purpose of risk analysis.<sup>319</sup> The ZKA has established a central web-based tool that facilitates cooperation and the sharing of databases between the licensing authorities and customs offices. This tool allows quick checks of an exporter’s trading history, including what types of items the exporter has shipped, whether they were licensable, whether licences were obtained and the exporter’s compliance record. The licensing authority BAFA also offers training courses and technical support to customs officials.

When a suspected export violation is discovered during the customs clearance process or during physical examination of a consignment at a border, the ZKA is immediately notified.<sup>320</sup> The Customs Investigation Service (Zollfahndungsdienst) comprises

<sup>317</sup> The Penal Code (note 300) has been used to convict a German entrepreneur on a charge of treason for attempting to sell dual-use technology to Iraqi President Saddam Hussein. Higher Regional Appeal Court of Bavaria, Case St 21/96, Judgement of 29 June 1993.

<sup>318</sup> The Agreement between the Kingdom of the Netherlands, the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland on Collaboration in the Development and Exploitation of the Gas Centrifuge Process for Producing Enriched Uranium was signed on 4 Mar. 1970 at Almelo, Netherlands, and entered into force on 14 Sep. 1971.

<sup>319</sup> On the databases available to the entire EU customs community see chapter 4 in this volume.

<sup>320</sup> This is regulated differently in the various EU member states; in many countries, the police are in charge of the investigation after seizures in the course of the customs clearance process.

the federal ZKA and eight local customs investigation offices, four of which are specialized in investigating dual-use export control violations.<sup>321</sup> Customs investigation officers have the same legal powers as police officers—for example, they can perform house searches and arrests, confiscate items as evidence, question suspects and witnesses, and carry out telecommunication and mail surveillance. Customs investigation officers may need to seek extraordinary legal powers from the public prosecutor if the case poses an imminent threat.

As in any criminal case in Germany, an initial suspicion is required before a formal investigation into an export violation can be launched and investigative powers such as interrogation, confiscation and arrest can be used.<sup>322</sup> An initial suspicion is considered to exist when there is sufficient evidence that an offence has been committed. In many cases, the investigating office must conduct a preliminary investigation in order to establish the initial suspicion. In others, a formal investigation may be initiated without a preliminary investigation. Below are four hypothetical examples of cases that may result in preliminary and formal investigations.

1. A customs officer at a German airport discovers a suspect consignment. The consignment is destined for a non-EU member state. The export declaration is inadequate and the end-use statement seems to be falsified.

2. ZKA officers receive information about the suspected illegal export of a dual-use item from a domestic or foreign intelligence service.

3. ZKA officers discover that an export violation has occurred or is imminent while conducting preventive telecommunication and mail surveillance.

4. During a trade audit, customs officers find grounds to suspect that a product has been exported without a licence.

On completing their investigation, customs investigators present the case file and a report to the public prosecutor's office, which

<sup>321</sup> The duties and authority of the ZKA and the customs investigation offices are regulated by the Reorganization of the Customs Investigation Service Act (*Gesetz zur Neuordnung des Zollfahndungsdienstes (Zollfahndungsdienstgesetz)*) of 16 Aug. 2002, BGBl I, 2002, p. 3202.

<sup>322</sup> Code of Criminal Procedure (*Strafprozessordnung*) of 12 Sep. 1950, section 161.

will then decide whether there is a strong enough case to proceed. The court will then verify the legal grounds for the charges, officially open the proceedings and set a date for hearings.

### **Final remarks**

As mentioned above, the German export control legislation and the system for enforcing the laws have undergone considerable revisions in the past decade. German legislators seem to respond quickly when weaknesses are exposed in the law—for example by introducing powers of preventive confiscation for customs investigators in the wake of the *Ville de Virgo* case. This has resulted in a strong legislative framework for combating export control violations. There have also been numerous export control prosecutions in Germany and these have, among other things, established a body of relevant case law. Learning from the mistakes of the past, German authorities, prosecutors and even judges have developed considerable know-how in the area of detecting, investigating and prosecuting dual-use export control violations.

## **II. Sweden**

So far only one case concerning the illicit export of dual-use goods has been prosecuted in Sweden. This prosecution took place in 1998. The defendant in the case—which involved an export and an attempted export of electrical devices called thyratrons to Iran—received only a relatively light sentence, despite the possibility that his activities contributed to Iran's nuclear weapon programme. This possibility was never really assessed by the Swedish legal authorities. One reason for this was the lack of suitable legislation. A description of the case is followed by a brief introduction to the current arrangements for detecting, investigating and prosecuting illegal exports of dual-use items in Sweden. These include three important new legal acts that directly address some of the gaps and ambiguities encountered in the investigation and prosecution in the thyratron case.

### The Halmstad thyatron case<sup>323</sup>

The Halmstad thyatron case concerns two attempts to export dual-use electronic items, thyatrons, to Iran.<sup>324</sup> Both were carried out by an Iranian-born Swedish citizen, Ehsan, at the request of a cousin in Tehran. The second was detected and prevented by Swedish customs officials.

According to Ehsan's testimony, in 1998 he was asked by his cousin to purchase a US-made thyatron and send it to him in Iran. The cousin told Ehsan that the device was needed for dental research at Amir Kabir University of Technology in Tehran but that US restrictions on exports to Iran prevented him from purchasing it himself.<sup>325</sup> Ehsan was offered nearly \$2000 (€2169 at current exchange rates) for arranging the transaction. Ehsan then found and contacted a US supplier of the required thyatron model, Richardson Electronics Ltd, which referred him to a Swedish subsidiary, Richardson Electronics Nordic AB.

In his first communication with Richardson Electronics Nordic, Ehsan stated that he intended to send the thyatron to Iran. The company refused, citing company policy on selling US dual-use items to customers who intended to re-export them.<sup>326</sup> Ehsan called the company again a week later, but this time claimed that he needed the thyatron himself for a university research project in Sweden. His order was accepted on the condition that he signed a company certificate confirming that he was the end-user. Ehsan did so and then forged the signatures of his mother, his brother and a fellow student at Ehsan's university as witnesses. Next, Ehsan issued a pro forma invoice in the name of his pizzeria, made out for

<sup>323</sup> This account is based on District Court of Halmstad, Case B 2051-99, Judgement of 25 Nov. 1999; and Court of Appeal for Western Sweden, Case B 5985-99, Judgement of 6 Sep. 2000.

<sup>324</sup> Thyatrons are high-energy switching devices with a range of civil (including medical) and military applications. They can be used in the ignition mechanisms of nuclear weapons. The thyatron model in this case, a grounded grid thyatron model F-205 manufactured in the USA by Triton Services Inc., was covered by item 3A228 (Nuclear Suppliers Group) in Annex I of the EC Dual-use Regulation (note 8).

<sup>325</sup> Amir Kabir University of Technology has frequently been suspected of acting as a front for the secret procurement of nuclear technologies. See e.g. Walsh, G., 'British campus link to Iranian nuclear centre', *Sunday Times*, 5 Feb. 2006; and 'Iranian procurement fronts', *Middle East Defense News*, 8 June 1992.

<sup>326</sup> On re-exports see 'export' in the glossary in this volume.

\$3800 (€4121), double the actual price of the thyatron. Ehsan's cousin transferred the sum through a bank in Germany and Ehsan paid Richardson Electronics Nordic for the thyatron, keeping the remaining money for himself.

Ehsan contacted Swedex, a transport company in Gothenburg, to transport the thyatron to Tehran. Ehsan wrote on the package that it contained an 'electronic device' and named his pizzeria as the sender. The thyatron was then delivered to Tehran. A year later, Ehsan followed much the same procedure in his attempt to export the second thyatron, this time addressing the package to a different Tehran university, Elm o Sanat (also known as the Iran University of Science and Technology).

The Swedish customs agency, Tullverket, started investigating the case in the autumn of 1999 after a trade audit had been conducted at Ehsan's pizzeria by customs officers based in Gothenburg. The audit had been requested by customs authorities at Stockholm's Arlanda Airport, which had discovered the package containing the second thyatron. Their attention was originally drawn to the package because it had been circulating at the airport for more than two weeks. This was the result of a misunderstanding between Ehsan and Swedex over who should pay the airport's freight handling charge.

In deciding whether there was a crime to investigate, the customs agency requested the specifications of the thyatron from Richardson Electronic. These specifications were sent to the Swedish licensing authority, the Inspectorate for Strategic Products (Inspektionen för strategisk produkter, ISP), for review. The ISP responded that it was a dual-use item and hence a licence was required for its export to any country outside the European Community.<sup>327</sup> The ISP also pointed out that Ehsan had signed the company end-user certificate, falsely claiming to have financed the purchase and to be the end-user himself, so he must have been aware that the thyatron was subject to US re-export restrictions. Later in the investigation a statement was obtained from the Swedish Defence Research Establishment (Försvarets forskningsanstalt, FOA) that supported the ISP's opinion and added that thyatrons

<sup>327</sup> See Council Regulation 3381/94 (note 158), referring to Annex 1 of Council Decision 94/942/CFSP.

were used in the early stages of the US nuclear weapon programme.<sup>328</sup> Once it had been informed of the dual-use application of the items, the customs agency referred the case to the Swedish customs investigation agency, Tullkrim.<sup>329</sup>

According to the Swedish Code of Judicial Procedure, criminal cases should be adjudicated by the district court at the place where the offence has been committed. If the offences have been committed at several places, the district courts of those places are equally competent, and the case should be heard in the court where it is most practical.<sup>330</sup> One of Ehsan's crimes—falsifying of documents—was committed in Halmstad, while the other crimes—the smuggling and attempted smuggling of dual-use items—were committed at Arlanda Airport. It was decided in the end that the case should be heard at Halmstad District Court, on the basis that, among other things, this would make it easier to conduct searches of the suspect's premises. Although Tullkrim employs prosecutors, it handed the case to the Halmstad public prosecutor.

Ehsan was charged on three counts: falsification of documents, aggravated smuggling (of the first thyatron) and attempted aggravated smuggling (of the second thyatron).<sup>331</sup> Ehsan pleaded guilty to the falsification charge. He also admitted to smuggling and attempted smuggling but contested that the crimes were grave. To secure convictions for smuggling under sections 1 and 3 of the 1960 Act on Penalties for Smuggling, the prosecutor had to convince the

<sup>328</sup> The FOA has since been renamed the Swedish Defence Research Institute (Totalförsvarets forskningsinstitut, FOI).

<sup>329</sup> On the responsibilities of Tullverket and Tullkrim (shortened from Tullkriminalen) see below.

<sup>330</sup> Swedish Code of Judicial Procedure (Rättegångsbalken), 18 July 1942, SFS 1942:740, as amended by the Act amending the Code of Judicial Procedure (Lag om ändring i rättegångsbalken) of 11 June 1998, SFS 1998:605, Chapter 19, Section 1. An English translation of the Code as of 1 Jan. 1999 is available at <<http://www.sweden.gov.se/sb/d/390/a/1540>>.

<sup>331</sup> The falsification of documents charge was under Swedish Penal Code (Brottsbalken) of 21 Dec. 1962, SFS 1962:700, as amended by the Act amending the Penal Code (Lag om ändring i brottsbalken) of 15 Apr. 1999, SFS 1999:197, Chapter 14, Section 1. The aggravated smuggling charge was under the Act on Penalties for Smuggling (Lag om straff för varusmuggling) of 30 June 1960, SFS 1960:418, as amended by the Act amending the Act on Penalties for Smuggling (Lag om ändring i lagen (1960:418) om straff för varusmuggling) of 3 June 1999, Sections 1 and 3. The attempted aggravated smuggling charge was under the Act on Penalties for Smuggling, Section 8, referring to Chapter 23, Section 1 of the Penal Code. An unofficial English translation of the amended Penal Code as of 1 May 1999 is available at <<http://www.sweden.gov.se/sb/d/3926/a/27777>>.



court that Ehsan had committed the smuggling offences with intent. He succeeded in doing this, citing the falsification of the end-user certificates. Ehsan was convicted of falsification of documents and of smuggling and attempted smuggling.

In sentencing, the judge took into account Ehsan's claim that he had not known, nor had any reason to suspect, the potential military application of the thyratrons. The prosecutor—on whom the burden of proof fell, as this was a criminal case—was unable to prove that Ehsan had made any effort to find out the potential end-use of the thyratrons. The court therefore concluded that there was no reason to believe that Ehsan knew that they could have a military use. For this reason, neither smuggling offence was considered grave. The prosecutor did not try to link Ehsan to a larger proliferation network. The court also referred to the systematic planning of the smuggling offence, as evidenced by the falsification of documents, but balanced against this Ehsan's relative youth: he had not reached the age of 21 at the time when the offences were committed. Ehsan was given four months' imprisonment.<sup>332</sup>

Later in 1999 both parties lodged appeals against the district court's judgements. Ehsan sought a non-custodial sentence, while the prosecutor wanted the smuggling convictions upgraded to grave and the sentence increased. The regional court of appeal agreed with the district court that there was insufficient evidence to prove Ehsan's knowledge of the possible military use of the products. However, it held that this did not preclude the offence being considered grave, arguing that, having been asked to sign an end-user certificate, Ehsan should have realized that the thyratrons were sensitive items. The appeal court changed the verdicts to grave smuggling and attempted grave smuggling but did not alter the sentence of the lower court.<sup>333</sup>

### *Reflections on the case*

As noted above, this case was Sweden's first prosecution for an export violation related to dual-use items. Several of the key actors in the investigation and the prosecution seem not to have appreciated the gravity of the crime. This fact, and the limits of the

<sup>332</sup> District Court of Halmstad (note 323).

<sup>333</sup> Court of Appeal for Western Sweden (note 323).

legislation available at the time, go some way towards explaining some of the more surprising aspects of the case.

In judging the gravity of a smuggling offence, special consideration is usually given to such factors as whether the smuggled items are particularly dangerous and their monetary value. At the time the offences were committed, Sweden had no special legislation on the smuggling of dual-use items. The 1998 Act on Strategic Products referred to the general smuggling act, the 1960 Act on Penalties for Smuggling, which provided for penalties ranging from fines to a maximum of two years' imprisonment.<sup>334</sup> Penalties for aggravated offences ranged from six months' to six years' imprisonment. Stronger penalties were available only for smuggling of narcotics. Both acts have since been repealed, and the new legislation is described later in this section.

In the Halmstad thyatron case, the prosecutor did not attempt to establish that Ehsan believed that the thyatrons were for use in a nuclear weapon programme. Thus, the court did not discuss the character of the smuggled items—or the possibility that they might justify a harsher penalty—in sentencing. This could have been because the public prosecutor—and, it might be assumed, most public prosecutors in Sweden at the time—had little knowledge regarding the security implications of dual-use items. It may also be explained by the limitations of the 1960 Act on Penalties for Smuggling. The main purpose of this act appears to have been to penalize exporters who try to avoid paying customs duties and related fees. Although Section 1, paragraph 2, stated that the act applied to exports 'in violation of a prohibition', it is conceivable that a prosecutor, reading the legislation without specific knowledge of the potential contribution of a dual-use item to a WMD programme, might not have seen a need to look into the exporter's intentions regarding end-use and thus might not present a strong argument for penalties in the higher range.

In its judgment, the appeal court decided that the offence should be considered grave because Ehsan was aware of the export restriction, even though it had not been proved that he was aware of the possible military use of the thyatrons, and the prosecutor

<sup>334</sup> Act on Strategic Products (Lag om strategiska produkter) of 4 June 1998, SFS 1998:397.

had not suggested that the thyratrons were to be used for nuclear weapon research. It would have been more logical to link the gravity of the offence to Ehsan's knowledge of the potential military application of the thyratrons. This highlights the possible pitfalls in applying legislation that is not tailored to a specific offence but is constructed to include several offences that are of different characters, as the 1960 Act on Penalties for Smuggling was. In effect, the limitations of that act limited the possibility of a verdict that reflected the gravity of the offences.

There was no recorded attempt during the trial to link Ehsan to a larger proliferation network. This raises the question, albeit hypothetical, of what direction the case could have taken if the prosecutor had considered this possibility. Such an investigation would undoubtedly have required the involvement of national and international intelligence services. It is not possible to rule out that such an investigation was in fact carried out, but there is no official evidence that it was. Also, one could speculate that Ehsan had purchased the pizzeria with the intention of making it a front for illegal exports, particularly considering the facts that the purchase took place only a year before the first thyratron export and that Ehsan used the company stamp on the invoices and gave the company's name as the sender on the documents given to Swedex. Once again there is no evidence in the investigation records to support this suspicion. However, the fact that these possibilities were evidently not investigated may indicate weaknesses in the investigation procedures, again possibly reflecting the lack of knowledge among Swedish investigators and prosecutors regarding offences related to dual-use goods.

Finally, Ehsan's sentence seems at first sight light, considering that his actions may have contributed to an Iranian nuclear weapon programme. However, since the prosecutor's case did not suggest that Ehsan was part of a proliferation network or that the items in question were to be used for military purposes, the sentence was probably reasonable, particularly taking into account Swedish penal tradition on the sentencing of young people.

## **Investigating and prosecuting dual-use export control violations in Sweden**

Both trials in the Halmstad thyatron case were undoubtedly complicated by the absence of established practice in the area of prosecuting export control offences related to dual-use goods. While there have been no prosecutions since, several steps have been taken to strengthen the legislation and clarify procedures. The current system for investigation and prosecuting such export violations is outlined below.

### *Export control legislation governing dual-use goods*

Today, exports of dual-use items are governed mainly by three pieces of Swedish legislation: the 2000 Act on the Control of Dual-use Products and Technical Assistance, the 2003 Act on Criminal Responsibility for Terrorist Offences and the 2000 Act on Penalties for Smuggling.<sup>335</sup> Together, these acts are intended to give force to the EC Dual-use Regulation. Additionally, the Swedish Penal Code may be applied to fill gaps, for example if it cannot be proved that an exporter had the intent to violate the export laws but has committed other offences that fall directly under the Penal Code.<sup>336</sup> In the Halmstad thyatron case, Ehsan was convicted of falsification of documents under the Penal Code.

The 2000 Act on the Control of Dual-use Products and Technical Assistance criminalizes any person found to have intentionally exported, without permission, dual-use items listed in the EC Dual-use Regulation or to have exported or transferred by elec-

<sup>335</sup> Act on the Control of Dual-use Products and Technical Assistance (note 194); the Act on Criminal Responsibility for Terrorist Offences (Lag om straff för terroristbrott) of 24 Apr. 2003, SFS 2003:148, as amended by the Act amending the Act on Criminal Responsibility for Terrorist Offences (Lag om ändring i lagen (2003:148) om straff för terroristbrott) of 19 May 2005, SFS 2005:319; and the Act on Penalties for Smuggling (Lag om straff för smuggling), 30 Nov. 2000, SFS 2000:1225, as amended by the Act amending the Act on Penalties for Smuggling (Lag om ändring i lagen (2000:1225) om straff för smuggling) of 5 June 2008, SFS 2008:520. An unofficial translation of the original Act on Criminal Responsibility for Terrorist Offences is available at <[http://www.isp.se/documents/public/se/pdf/lagar/2003\\_148e.pdf](http://www.isp.se/documents/public/se/pdf/lagar/2003_148e.pdf)>. An unofficial translation of the original 2000 Act on Penalties for Smuggling is available at <<http://www.regeringen.se/sb/d/3926/a/27768>>.

<sup>336</sup> Swedish Penal Code (note 331).

tronic means software or technology listed in the regulation. The penalty is a fine or a prison term of up to two years, unless the crime is considered particularly grave, in which case the act provides for a prison term of between six months and six years. The gravity of the crime is judged according to whether it was part of criminal activity carried out systematically or on a larger scale or whether it significantly affected the public interest. If the offence is judged to have been committed through gross negligence rather than with intent, a maximum penalty of two years' imprisonment applies.<sup>337</sup> The act refers to the Swedish Penal Code for penalties for attempts to carry out unlicensed exports of dual-use items and for preparation and conspiracy to commit such offences if the offences are grave.<sup>338</sup> Crucially, the act provides for criminal penalties of fines or imprisonment for persons who—intentionally or negligently—submit incorrect information to the licensing authority, neglect to provide information that would affect the decision of the authority relating to crimes covered by the act, or neglect to learn about the conditions for exporting from the European Community provided for in the EC Dual-use Regulation.<sup>339</sup>

Persons committing an offence under the Act on Control of Dual-use Products and Technical Assistance that relates to products or technical assistance that could be used in the production of nuclear charges or of biological or chemical weapons can be charged with a terrorist offence under the 2003 Act on Criminal Responsibility for Terrorist Offences. For this to happen, the offence would have to risk seriously damaging a state or an intergovernmental organization and its intent be to seriously intimidate a population or group of a population, unduly compel a public authority or an intergovernmental organization to perform an act or abstain from acting, or seriously destabilize or destroy funda-

<sup>337</sup> Act on the Control of Dual-use Products and Technical Assistance (note 194), sections 18 and 19.

<sup>338</sup> Act on the Control of Dual-use Products and Technical Assistance (note 194), Section 21, referring to Chapter 23 of the Swedish Penal Code (note 331). The act also refers to Chapter 23 of the Penal Code for penalties for attempting to provide technical assistance outside the European Community intended for use in connection with the development, production, handling, use, maintenance, storage, detection, identification or proliferation of WMD or their means of delivery.

<sup>339</sup> Act on the Control of Dual-use Products and Technical Assistance (note 194), Section 22.

mental political, constitutional, economic or social structures in a state or in an intergovernmental organization. For such offences the act provides for imprisonment for a fixed term of at least four and at most 10 years, or for life. A sentence of between two and six years' imprisonment may be imposed for less serious offences.<sup>340</sup>

The 2000 Act on Penalties for Smuggling, while not the main instrument for prosecuting illegal exports of dual-use goods, includes some provisions that are relevant for such cases. These concern the procedures and the division of competences between Tullverket and public prosecutors in preliminary investigations of export violations.<sup>341</sup>

### *Detection, investigation and prosecution procedures*

Sweden's approach to combating illegal exports builds on the principle that early prevention is more effective than detection at the border. Thus, the focus is on licensing procedures and on effective intelligence to facilitate the detection, disruption and prosecution of illegal export activities.

Tullverket's functions can be divided into operational functions related to managing the flow of goods and people across Sweden's borders, and executive functions, which include detecting and investigating import- and export-related crimes along with work to prevent organized crime. Tullkrim is responsible for investigation and can also carry out prosecutions for minor offences. Tullkrim, supported by its intelligence service, monitors cross-border traffic to detect illegal imports and exports. Its major tasks are searches, risk analysis, and investigating organized smuggling and customs-related economic and environmental crimes. Through the combination of preventive work and prosecutions, Tullkrim seeks to make export violations less attractive and profitable.

If any customs official detects a possible case of smuggling while carrying out a customs clearance, trade audit or risk analysis, Tullkrim is legally empowered to initiate a preliminary investigation.<sup>342</sup> However, a large proportion of cases are not detected by customs officers but are referred to Tullkrim by the licensing authority. The

<sup>340</sup> Act on Criminal Responsibility for Terrorist Offences (note 335), sections 2 and 3.

<sup>341</sup> See e.g. Act on Penalties for Smuggling (note 335), sections 13, 23(a) and 24.

<sup>342</sup> Act on Penalties for Smuggling (note 335), Section 13.

ISP notifies Tullkrım whenever it identifies a weakness in an export licence application that could be explained by criminal activity. Tullkrım employs customs prosecutors who are responsible for minor smuggling cases. Public prosecutors generally supervise the customs prosecutors and should take over a case if it turns out to have more serious aspects or if there are special considerations. Usually, a case is considered to be of a simple nature if the offence could lead to no more than a fine.<sup>343</sup> Swedish prosecutors are obliged to prosecute if there is sufficient evidence to prove the suspect's guilt.<sup>344</sup> They do not need to prove that the prosecution is in the public interest as is the case in the UK, for example. It is simply assumed that, if a law has been broken, prosecution will serve the public interest.

The local prosecution offices of the Swedish Prosecution Authority (Åklagarmyndigheten) carry out prosecutions in local courts but are directly answerable to the Office of the Prosecutor General (Riksåklagaren), which is responsible for management, planning and coordination. The central management structure includes a national development centre (utvecklingscentrum) that has offices in three major cities. These centres focus on, among others, legal development, analysing and following up the application of the law, working methods and knowledge development. Each centre is responsible for a number of crime areas.

The civil police share with Tullverket the power to investigate smuggling and other crimes related to border crossings. This means that either Tullkrım or the police could be responsible for investigating an illegal export, depending on which agency first detected it. However, cases when the civil police would lead such an investigation are likely to be very rare. Tullkrım's intelligence service also works in parallel with another branch of the police, the Swedish Security Service (Säkerhetspolisen, SÄPO), whose tasks include participating in non-proliferation efforts. SÄPO investigates offences under the 2003 Act on Criminal Responsibility for

<sup>343</sup> See Proposition 1997/98:11 Sveriges tillträde till CIS-Konventionen och en ny lag om register i Tullverkets brottsbekämpande verksamhet [Proposal 1997/98:11 on Sweden's accession to the CIS Convention and for a new law on the register of the law enforcement activity of the Customs Agency], Section 6.2. On the CIS Convention see note 250 and chapter 5, section II, in this volume.

<sup>344</sup> The regulations governing the Swedish Prosecution Service are set out in Chapter 23 of the Swedish Code of Judicial Procedure (note 330).

Terrorist Offences, including those under the 2000 Act on the Control of Dual-use Products and Technical Assistance if they qualify as terrorist offences (see above). Twice annually, SÄPO convenes the Small Reference Group, a meeting of national authorities, including Tullverket, which provides a forum for formalized cooperation on non-proliferation matters.

A new prosecution office was created in September 2006 with special responsibility for national security, the Prosecution Office for the Security of the State (Åklagarkammaren för säkerhetsmål).<sup>345</sup> This office gathers together the Prosecution Authority's previously scattered competences related to national security. It is responsible for prosecutions of terrorism-related offences but would also be referred cases of illegal dual-use exports if they potentially constitute a threat to national security—for example, if the suspect might be part of a larger proliferation network.

### **Final remarks**

The Halmstad thyatron case illustrates the importance of reviewing and updating legislation to ensure that it suits its purpose. The adoption of the 2000 Act on the Control of Dual-use Items and Technical Assistance was a much-needed step, providing an appropriate and tailored legal framework for the prosecution of illegal exports of dual-use items. The general smuggling act used in the Halmstad case was clearly insufficient.

Arguably, Sweden—like many European states—has not yet come far enough in its review of export control legislation, structures and procedures. The lack of any prosecutions to date under the Act on the Control of Dual-Use Products and Technical Assistance probably indicates that the system is not yet functioning as it should. One possible area of weakness is the sharing of competences between Tullkrim, the civil police and their respective intelligence services for investigating suspected export violations in the area of dual-use items. This surely opens up the possibility of duplication of effort and even counterproductive clashes. At the very least, this requires a good degree of inter-agency cooperation.

<sup>345</sup> SIPRI and the Prosecution Office for the Security of the State jointly hosted a conference in Stockholm in Sep. 2007. See note 16.



Finally, a remark on resources. The trial and subsequent appeal in the Halmstad case illustrated the importance of all links in the enforcement chain. It is striking that the prosecutor almost entirely failed to address the serious proliferation aspects of the case. This was despite FOA's statement that thyratrons had been used in the US nuclear weapon programme and publicly available reports suggesting that the Iranian Government had a covert nuclear weapon programme and had used Amir Kabir University of Technology as a purchasing front. In 2008 the Swedish Prosecution Authority was overloaded with cases. This is in large part because the government in 2008 significantly increased its budget allocation to the police without doing so for the prosecution service. In these circumstances it seems unlikely that Swedish prosecutors will find the time and resources to increase their knowledge of illegal exports of dual-use items.

### III. The Netherlands

Henk Slebos, a Dutch businessman, is believed to have been a purchasing agent for the Pakistani nuclear programme initiated by A. Q. Khan.<sup>346</sup> In December 2005 Slebos was convicted on several charges related to the illegal export of dual-use items in a lower court in the Netherlands and sentenced to one year's imprisonment. The investigation leading up to the trial illustrates several key concerns relating to the application of the EU legislation for export control of dual-use goods. Foremost among these is the important role that national law enforcement actors and prosecutors play in giving effect to the EU legislation. To do this, these actors must be aware of the direct connection that can exist between unlicensed exports of dual-use goods and the proliferation of WMD. The case also highlights the need for inter-agency and international cooperation in combating trafficking in dual-use goods. As the appeal case concluded only in January 2009, there is a shortage of details concerning both the initial trial and the

<sup>346</sup> For a brief description of A. Q. Khan and his network see chapter 1 and the glossary in this in this volume.

appeal.<sup>347</sup> Thus, the case study presented here focuses on the investigation that led up to the trial.

The experience of investigating and prosecuting Slebos gave the relevant parts of the Dutch law enforcement community and prosecution service a greater awareness of the risks related to trafficking in dual-use goods and an opportunity to develop their capacities to combat it. It is to be hoped that steps will be taken to preserve institutional memory and ensure that this awareness and capacity are not lost over time.

### **The Slebos case**<sup>348</sup>

In January 2001 the Dutch customs authorities received a request for legal assistance from US authorities concerning dual-use goods produced by a US firm. A few months later, in July 2001, a similar and apparently connected request was received from German authorities. According to the information received, in 1998 a Dutch firm, Slebos Research BV, had purchased six absolute capacitance manometers from a German subsidiary of the US manufacturer MKS Instruments Inc. and exported them to Pakistan. These pressure gauges can be used during uranium enrichment.<sup>349</sup> Analysts believe that the recipient in Pakistan, A. Q. Khan, manufactured copies of the manometers and offered them for sale to Iran, Libya and North Korea. In February 2004, Khan admitted to having supported the nuclear programmes developed by these states.<sup>350</sup>

<sup>347</sup> Amsterdam Court of Appeals, Judgements LJN: BH1773, BH1775 and BH1777 of 30 Jan. 2009.

<sup>348</sup> This account is based on District Court of Alkmaar, Case 14.038041-04, Judgement LJN: AU8250 of 16 Dec. 2005; Slijper, F., *Project Butter Factory: Henk Slebos and the A. Q. Khan Nuclear Network*, Transnational Institute Briefing 2007/01 (Transnational Institute/Campagne tegen Wapenhandel: Amsterdam, Sep. 2007); Hibbs, M., 'The unmaking of a nuclear smuggler', *Bulletin of the Atomic Scientists*, vol. 62, no. 6 (Nov./Dec. 2006), pp. 35–63; and interviews with investigators involved with the case, Dec. 2006, and Rotterdam, Oct. 2008.

<sup>349</sup> The absolute capacitance manometer is a kind of pressure gauge. It is covered by item 3.A.7. of the NSG dual-use list. Nuclear Suppliers Group, Annex: list of nuclear-related dual-use equipment, materials, software, and related technology, INFCIRC/254, part 2. The current version of the dual-use list is available at <<http://www.nuclearsuppliersgroup.org/guide.htm>>. On the NSG see chapter 2, section III, in this volume.

<sup>350</sup> See Astill, J., "I offer my deepest regrets to a traumatised nation", *The Guardian*, 5 Feb. 2004.

Dutch customs officers had not questioned the 2001 export, which was accompanied by documentation that correctly identified the goods as transducers, Slebos Research as the exporter and Pakistan as the destination, despite the fact that the Dutch authorities had been aware of the involvement of the company's owner, Henk Slebos, in illegal exports of proliferation-sensitive items since at least 1980.<sup>351</sup> In 1985 he had been convicted for illegally exporting a dual-use item, an oscilloscope that was ultimately bound for Pakistan, through Amsterdam's Schiphol Airport.<sup>352</sup> Slebos was also known by the Dutch authorities to be an associate of A. Q. Khan. Slebos had a close personal relationship with Khan dating back to the early 1960s, when both had studied metallurgy at Delft University of Technology in the Netherlands. Both had also worked for subsidiaries of the nuclear fuel group Urenco, which developed centrifuges for uranium enrichment. From 1983 Slebos had frequently been mentioned in discussions of sensitive exports and had received several written warnings not to export specific dual-use items to Pakistan because of suspicions that they could be used in WMD development.<sup>353</sup>

Officers of the Dutch Tax and Customs Administration's investigation service, the Fiscal Investigation and Information Service—Economic Investigation Service (Fiscale Inlichtingen en Opsporingsdienst—Economische Controle Dienst Belastingdienst; FIOD-ECD), started to investigate the export of the manometers in 2001. Evidence gathered during searches of Slebos's house and of the premises of his two companies, Slebos Research and Bodmerhof BV, showed that the manometers had been exported without a licence even though MKS Instruments had included a warning on its invoice—in accordance with the EC Dual-use Regulation—stating that an export licence would be required.<sup>354</sup> There was also clear documentary evidence that Slebos's companies had exported many items to Pakistan. The Institute of Industrial Automation (IIA), which was believed to be linked to A. Q. Khan's Khan Research Laboratories, was named as the recipient on several

<sup>351</sup> See e.g. Slijper (note 348), pp. 15–18, 20.

<sup>352</sup> Slijper (note 348), p. 20.

<sup>353</sup> Slijper (note 348). The catch-all clause was introduced into Dutch legislation only in 1997, so these warnings had no legal effect.

<sup>354</sup> Council Regulation 1334/2000 (note 8), Article 21(7).

documents and on others the name of the recipient appeared to have been deliberately removed. Most of the goods exported had not been listed as dual-use goods or been subject to a catch-all warning. However, the investigators identified seven exports to Pakistan that appeared to breach export controls.

Convincing a prosecutor to take the case proved difficult for the FIOD-ECD investigators. From 2003, three prosecutors declined the case on the basis that Slebos's activities constituted only minor economic offences—the total value of the manometers was only €10 000—and were thus of little concern. At this time, there was low awareness among Dutch prosecutors of export controls or proliferation concerns related to Pakistan or A. Q. Khan. It was only in 2004, three weeks before Khan's public confession, that a prosecutor accepted the case. This was probably in large part because the investigators had compiled new information regarding the links between Slebos and Khan in an attempt to highlight the potential grave consequences of Slebos's export violations.

Slebos was eventually tried in the District Court of Alkmaar for five export control violations in his capacity as manager of his two companies. The charges concerned exports of the following goods:

1. Six manometers. These were exported in 1999 in violation of a licence requirement.

2. Several thousand O-rings (a sealing device). A catch-all warning was issued to Slebos in August 2001, forbidding him to supply these to Pakistan. These were exported in two consignments between 2001 and 2002. The illegal export was detected through cooperation between Dutch and German officials. Slebos revealed that the O-rings had been transported by car from the Netherlands to Belgrade and then flown to Pakistan.

3. Several special bearings. Catch-all warnings had been issued to Slebos for these in December 2001 and January 2002. Slebos exported the bearings in early 2002. They matched specifications for the bottom bearings of the CNOR model centrifuge developed by Urenco. Although in 2001 Western analysts believed that Pakistan had stopped trying to develop such a centrifuge, Iran, Libya and North Korea were thought to have been trying to do so. Thus, there was a risk that Pakistan intended to export the bearings to one of those countries.

4. Twenty kilograms of the industrial chemical triethanolamine (TEA). This was exported in 2002. TEA is included in Annex I of the EC Dual-use Regulation.<sup>355</sup> The invoice for the product had included a warning about the licence requirement.

5. A consignment of 104 graphite blocks. These blocks, which were exported in 1999, were covered by the control lists of the 1994 Dual-use Regulation.<sup>356</sup> In 1999 a representative of the company Dynimpex BV was fined for illegally exporting this consignment.<sup>357</sup> Dutch investigators found evidence that Slebos had acted as a broker in the export after recovering data from the erased hard disk of a computer seized during searches of Slebos's premises.

Two other suspected violations were not taken to trial. The first was the export, some time between 2000 and 2001, of several thousand small steel balls of a type matching the specification for part of a special bearing that it was believed could be used in uranium centrifuges. In 1998 a German businessman, Ernst Piffel, also linked to A. Q. Khan, had been sentenced to almost four years' imprisonment in Germany for exporting centrifuge parts to Pakistan.<sup>358</sup> In 2001 German authorities told FIOD-ECD that their investigations of Piffel's activities indicated that Slebos had arranged the export. However, the balls had not been listed as dual-use items and no catch-all warning had been issued at the time of the export, so it could not be proved that Slebos had violated export controls when he exported them. The second export, of a grinding machine, was not taken to trial for similar reasons. Authorities agreed that both exports were clearly of dual-use items and that the catch-all clause should have been applied.

A disturbing aspect of the case was the unauthorized presence of two members of the General Intelligence and Security Service (Algemene Inlichtingen- en Veiligheidsdienst, AIVD) during an FIOD-ECD search in 2004. This made evidence gathered during the search inadmissible in court.

Slebos was convicted—as the responsible manager in his companies—on counts 1, 2, 4 and 5 in the above list under the 1962

<sup>355</sup> On the annex lists see the glossary in this volume.

<sup>356</sup> Council Decision 94/942/CFSP (note 158).

<sup>357</sup> Slijper (note 348), p. 29.

<sup>358</sup> Slijper (note 348), p. 28.

Import and Export Act, the 1986 Decree on Issuing of Certificates for Strategic Goods and the Dutch Penal Code.<sup>359</sup> He was not convicted for the export of the special bearings because the catch-all warnings had been sent to the wrong address. Thus, it could not be proved that Slebos was aware of the warnings at the time of the exports—although he did not deny exporting the bearings. Slebos was fined €100 000 and sentenced to 12 months' imprisonment, with a recommendation that he be released after four.<sup>360</sup>

### *Reflections on the case*

The Slebos case illustrates some of the difficulties of bringing dual-use export control violations to trial and of ensuring that the offenders receive a punishment appropriate to the seriousness of the crime. Low awareness among prosecutors at the time meant that investigators struggled even to get the case taken up. Subsequently, the question of Slebos's intent to proliferate—or at least his knowledge that he could be abetting proliferation—does not seem to have been addressed in any depth, at least not by the court. Certainly, he had a long-standing close personal—and apparently business—relationship with A. Q. Khan. Also, there is the appearance of IIA's name as end-user—and the apparent deliberate removal of other names—on various seized documents. If Slebos did know of his old friend's proliferation activities, there is also the question of his motive: did he help Khan as a personal favour, for profit or because he actually wished to support the Pakistani WMD programme, and perhaps similar programmes in Iran, Libya or North Korea?

<sup>359</sup> Specifically, Slebos, along with a former employee, was convicted under Section 2 of the Import and Export Act (In- en Uitvoerwet) of 5 July 1962, Staatsblad (Stb.) 1962, 295; sections 2 and 2(a) of the Decree on Issuing of Certificates for Strategic Goods (Besluit afgifte verklaringen strategische goederen) of 10 July 1986, Stb. 1986, 417; and sections 14(a), 14(b), 14(c), 23, 24(c), 47, 51 and 57 of the Dutch Penal Code (Wetboek van Strafrecht) of 3 Mar. 1881, Stb. 1881, 35. The Import and Export Act and the Decree on Issuing of Certificates for Strategic Goods have since been repealed.

<sup>360</sup> Fines were also imposed on the companies and the former employee was sentenced to 180 hours of community service and fined €5000. Slijper (note 348), p. 29. Both parties appealed. On 30 Jan. 2009, Slebos's sentence was increased to 18 months' imprisonment (with 6 months suspended) and €135 000 in fines. Amsterdam Court of Appeals (note 347).

Such questions are crucial in a case such as this. However, establishing the answers beyond reasonable doubt can be difficult. The prosecutor appears to have been aware of the possible ramifications of the case but in the end opted to charge Slebos only under legislation designed for economic crimes. The challenge for prosecutors is even greater given that two levels of intent are important in such cases: first, the intent to violate export control regulations and second, the intent to contribute to a WMD programme.

The Slebos case also shows the importance of catch-all clauses in national export control legislation. Since the early 1980s, Slebos had received numerous warnings from the Dutch authorities that he should not export certain unlisted goods to sensitive destinations. Until the Dutch catch-all clause came into force in 1997, he could ignore these warnings with impunity, but when he was convicted in 2005, several of the counts relied on catch-all warnings. On a related matter, Slebos's acquittal on one charge because of the wrongly addressed warning highlights the need to establish clear routines to ensure that such warnings reach their intended recipients promptly.

The case also demonstrated the value of Article 21(7) of the EC Dual-use Regulation, which stipulates that

the relevant commercial documents relating to intra-Community transfers of dual-use items listed in Annex I shall indicate clearly that those items are subject to controls if exported from the Community. Relevant commercial documents include, in particular, any sales contract, order confirmation, invoice or dispatch note.<sup>361</sup>

Because the vendors of both the manometers and the TEA had included such warnings on their invoices, it was easy to prove that Slebos knew of the export licence requirement when he exported the products. Such instruments can greatly facilitate the work of prosecuting illegal exporters of dual-use goods and thus combating WMD proliferation.

The sentence received by Slebos seems lenient. In sentencing, the judge recognized that the offences were particularly grave because they had harmed the interests of non-proliferation. Slebos's 1985 conviction for a similar offence was also taken into

<sup>361</sup> EC Dual-use Regulation (note 8), Article 2(7).

account. However, balancing these were Slebos's 'statements about his personal situation' and a promise to abandon such activities in future. The unauthorized presence of intelligence officers during a search was also cited as a reason to recommend early release.<sup>362</sup>

### **Investigating and prosecuting dual-use export control violations in the Netherlands**

#### *Export control legislation governing dual-use goods*

The legal basis for export controls on strategic goods in the Netherlands consists of several acts, decrees, decisions and regulations. The General Customs Act, which entered into force in late 2008, has become the basic act setting out provisions for the Tax and Customs Administration's powers of customs supervision and inspection of goods and their movements.<sup>363</sup> The act deals with both tax-related and non-tax-related matters, including the governance of dual-use goods. It also sets out the competences of law enforcement actors in the area of export controls.

The adoption of the General Customs Act repealed the 1962 Import and Export Act—which had previously governed imports and exports of dual-use goods—and all regulations based on it.<sup>364</sup> The new act and related legislation introduce no major changes to the content of customs law and regulations. The 1963 Decree on Import and Export of Strategic Goods, which was linked to the Import and Export Act, has been replaced by a new decree on strategic goods passed in June 2008.<sup>365</sup> The provisions of the other repealed legislation have been included in the General Customs Act or the connected General Customs Decree and General Customs Regulation.<sup>366</sup> The new act is intended to improve the efficiency of, increase the transparency of and simplify the legislation on

<sup>362</sup> District Court of Alkmaar (note 348).

<sup>363</sup> The General Customs Act (*Algemene Douanewet*) of 3 Apr. 2008, Stb. 2008, 111. It entered into force on 1 Aug. 2008.

<sup>364</sup> Import and Export Act (note 359); and Decree on Issuing of Certificates for Strategic Goods (note 359).

<sup>365</sup> The Strategic Goods Decree (*Besluit strategische goederen*) of 24 June 2008, Stb. 2008, 252, replaced the Decree on Import and Export of Strategic Goods (*In- en Uitvoerbesluit Strategische Goederen*) of 26 Apr. 1963, Stb. 1963, 128.

<sup>366</sup> General Customs Decree (*Algemeen douanebesluit*) of 5 July 2008, Stb. 2008, 288; and General Customs Regulation (*Algemene douaneregeling*) of 14 July 2008, *Staatscourant* 2008, 145.



customs inspection powers, as well as to keep the Dutch legislation up to date with modern methods of customs supervision. The revisions also specifically adapt the customs legislation to the revisions of the Community Customs Code.<sup>367</sup> As the General Customs Act came into force only in August 2008, little has been written about its practical application.

Importantly, violations of export laws are considered economic offences in the Netherlands. In most cases, companies will be warned or fined for an unauthorized export, at least if it only happens once and is to a non-sensitive destination. Should the final destination be a sensitive one, there will most likely be a fuller investigation, but this depends on the information gathered by the intelligence service and the Tax and Customs Administration and certainly also on the willingness of the prosecutor to launch an investigation. The framework legislation for economic offences in the Netherlands is the 1950 Economic Offences Act.<sup>368</sup> All references in the Economic Offences Act to the 1962 Import and Export Act have been replaced with references to the General Customs Act. The Economic Offences Act remains the punitive framework for the General Customs Act.<sup>369</sup> Violators can be sentenced to up to six years' imprisonment.<sup>370</sup> However, Dutch courts have a tradition of not applying the maximum penalties in criminal cases. Conspiracy to violate export control laws and attempting to falsify an end-user document are both crimes but would be prosecuted under the Penal Code rather than the General Customs Act.<sup>371</sup>

Since 2005, the recipient of a catch-all warning from the Dutch export control authorities has been legally obliged to notify them of any intended transfer of the goods for a different end-use or destination, even within the Netherlands or to another EU member state.<sup>372</sup> In most EU member states, the recipient would only have to notify the authorities about an intended export.

<sup>367</sup> On the Community Customs Code see chapter 4, section II, in this volume.

<sup>368</sup> Economic Offences Act (*Wet op de economische delicten*) of 22 July 1950, Stb. 1950, 258.

<sup>369</sup> General Customs Act (note 363), Section 11(3)(1). On FIOD-ECD see below.

<sup>370</sup> Economic Offences Act (note 368), Section 6.

<sup>371</sup> Dutch Penal Code (note 359).

<sup>372</sup> This provision is now in the Strategic Goods Decree (note 365), Section 3.

*Detection, investigation and prosecution procedures*

Like all customs services, the Dutch Tax and Customs Administration is responsible for the physical examination of goods for import or export, verifying the existence and authenticity of documents related to imports and exports, examining business accounts and other records, and physically inspecting freight, luggage and other goods carried by or on persons. The agency's mission in the area of export controls should be seen in the light of the fact that export control violations are treated as economic offences. Goods that are intended to leave the customs territory remain under customs supervision until the export declaration is cleared. This includes goods that are placed under the customs export procedure (including dual-use goods that are listed in the EU annex lists) and goods for which a re-export declaration or notification has been submitted. The Tax and Customs Administration has a special unit, Team POSS (for Precursoren, Oorsprong en Strategische Goederen en Sancties; precursors, EU fraud and strategic goods and sanctions), whose tasks include overseeing exports of dual-use goods. Export licences are issued by the Central Import and Export Agency (Centrale Dienst voor In- en Uitvoer, CDUI).

FIOD-ECD, the Tax and Customs Administration's investigation arm, is responsible for the detection and investigation of economic crimes, including export control violations. It also contributes to efforts against organized crime and terrorism by mapping financial transactions linked to criminal and terrorist organizations. Since 2007, the FIOD-ECD's core tasks have been in the areas of inspection and detection. Previously, it was also responsible for supervising compliance with the laws, but this remit has now been transferred to the Tax and Customs Administration.

The FIOD-ECD and the national police both have authority to conduct investigations. The police would normally not interfere in investigations of export control-related offences. However, the police can request FIOD-ECD's help in investigating crimes related to acts of terrorism and crimes under international law. The two agencies can thus form joint investigation teams, as they did in 2004 for the criminal investigation of Dutch businessman Frans

van Anraat.<sup>373</sup> Cooperation between the police and the Tax and Customs Administration is regulated by inter-agency agreements. The police may provide information to the customs service subject to special conditions. Although FIOD-ECD investigators have investigative powers, they would usually consult a prosecutor before exercising them, unless immediate action was needed, in which case they can seek retroactive approval.

In addition to the systems to enforce the export control laws, the National Coordinator for Counterterrorism (Nationaal Coördinator Terrorismebestrijding, NCTb) has established a unit to address the risk of terrorist attacks with chemical, biological, radiological and nuclear (CBRN) weapons.<sup>374</sup> The unit coordinates projects that seek to, among others, increase prevention and security awareness at research institutes, universities and chemical companies and in the transport of CBRN weapons and optimize vigilance at the borders regarding CBRN weapons in order to reduce the risk of terrorists being able to access WMD materials, dual-use goods and knowledge. The unit also enhances detection capabilities, for example buying equipment for the detection of biological and chemical agents and vehicles equipped for on-the-spot radiological monitoring.

<sup>373</sup> In The Hague Court of Appeal, Frans van Anraat was acquitted of a charge under Section 1 of the Genocide Convention Implementation Act (Uitvoeringswet genocideverdrag) of 2 July 1964, Stb. 243 and convicted on charges under Section 8 of the 1952 Criminal Law in Wartime Act (Wet Oorlogsstrafrecht) of 10 July 1952, Stb. 408, in conjunction with Section 48 of the Dutch Penal Code (note 359) and sentenced to 17 years' imprisonment. Van Anraat was found to have sold raw materials to the Iraqi Government of Saddam Hussein several times during the 1980s in the knowledge that they were being turned into mustard gas and used in chemical attacks against the Kurdish population in northern Iraq. In the course of a thorough investigation, a team led by the Dutch prosecutor, Frank Teeven, travelled to Iraq and determined that the exact chemicals sold by van Anraat matched those used in the attacks. District Court of The Hague, Case 09/751003-04, Judgement LJN: AU8685 of 23 Dec. 2005; and Court of Appeal of The Hague, Case 09/751003-04, Judgement LJN: BA673 of 9 May 2007. These rulings can be accessed at <<http://www.haguejusticeportal.net/>>. For commentary on the van Anraat case see e.g. van der Wilt, H. G., 'Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the van Anraat case', *Journal of International Criminal Justice*, vol. 4, no. 2 (July 2006), pp. 239–57; and van der Wilt, H. G., 'Genocide v. war crimes in the van Anraat appeal', *Journal of International Criminal Justice*, vol. 6, no. 3 (July 2008), pp. 557–67.

<sup>374</sup> For more information on the NCTb's work against CBRN terrorism see 'Addressing the risk of terrorist attacks with non-conventional weapons', National Coordinator for Counterterrorism website, <[http://english.nctb.nl/Counterterrorism/CBRN\\_terrorism/](http://english.nctb.nl/Counterterrorism/CBRN_terrorism/)>.

Team POSS and FIOD-ECD meet every eight weeks with the Ministry of Foreign Affairs, the Ministry for Economic Affairs, the AIVD, the CDUI and customs officers to discuss, among other things, the efficiency of regulations and international developments related to export controls. Team POSS's databases include company profiles and records of licence denials. These are used to identify appropriate dates for company audits. Since 2007, the databases have been shared between the Tax and Customs Administration and the CDUI, which is thought to have increased effectiveness in the investigation of violations of export controls.

In the Netherlands, the Public Prosecution Service (Openbaar ministerie) is responsible for supervising all investigations that are carried out by the law enforcement authorities. Thus, all investigations that involve, for example, house searches, interrogation of suspects and witnesses, or the use of coercive measures must be authorized by a public prosecutor. Once the investigation has been completed, the case is again referred to the prosecution service, which can decide whether or not the case should be taken to trial. The assessment should be based on the public interest and available resources. In 2002 the Public Prosecution Service set up a new unit, the Functional Public Prosecutor's Office, located in The Hague. It prosecutes criminal cases being investigated by special investigation departments, including the FIOD-ECD. It was set up to concentrate and improve the capacities of the Public Prosecution Service in the fields of environmental and economic crime—including export control violations—and thus to relieve the burden on regular public prosecutors.

### **Final remarks**

The foreword of the Dutch Tax and Customs Administration Business Plan 2008–2012 states that

The work of Customs is radically changing, slowly but surely. Import duties have declined and there has been a switch from the inspection of goods, from incoming to outgoing. The pace of these changes is uncertain and not only subject to our control. This is proving difficult for our

Customs personnel, and is expressed in feelings of restlessness that are all too understandable.<sup>375</sup>

This statement clearly expresses the difficulties and frustrations faced by those responsible for enforcing export control legislation governing dual-use goods. Enforcement systems are inevitably vulnerable due to the constant need to adapt to changes in international legislation and to the evolution of international trade and the proliferation threats that export controls seek to neutralize. Perhaps the most valuable lesson of the Slebos case is how important the dedication and understanding of the individuals in the systems can be in making export controls an effective tool in non-proliferation.

#### IV. The United Kingdom

The case study from the UK does not include a prosecution under export control legislation. Instead it describes the investigation of allegations that a terrorist network was attempting to produce a nerve agent, ricin, for use in a WMD attack. It was believed that the ricin was to be manufactured using products easily available on the open market. The case was chosen to illustrate the risk that terrorists will acquire a WMD using dual-use items that are easily available. The case also shows how criminal investigations of this kind can be exploited for political purposes—before the case had come to trial, the US Secretary of State, Colin Powell, cited the alleged plot in his attempts to legitimize the invasion of Iraq in 2003—as well as the importance of applying the correct procedures and principles, including the presumption of innocence, even when a case involves suspected terrorism or WMD proliferation. The existence of the plot was never proved and many of the public statements made about the case before the trial were based on discredited evidence. The overview of the current British export control system for dual-use goods that follows includes short accounts of some recent prosecutions under the new export control laws.

<sup>375</sup> Dutch Tax and Customs Administration, Business plan 2008–2012, available at <<http://www.belastingdienst.nl/download/en/1924.html>>.

### The ricin case<sup>376</sup>

Ricin is made from the waste material left over from the extraction of castor oil. Because of ricin's strong toxic effects, its hostile use is prohibited under both the 1972 Biological and Toxin Weapons Convention and the 1993 Chemical Weapons Convention.<sup>377</sup> In large quantities, ricin can be used in the production of toxin weapons. To date, ricin has been used in assassinations but not yet in a terrorist attack. Iraq is an example of a state that has used ricin in its biological and chemical weapons programmes. The Iraqi Government admitted to inspectors from the UN Special Commission on Iraq (UNSCOM) in 1995 that it had both produced and weaponized the substance.<sup>378</sup> Remnants of ricin were later found on fields near Fallujah where President Saddam Hussein carried out chemical attacks against the Kurdish population in the late 1980s. However, because of the low effectiveness of the toxin compared to many other agents, analysts are more concerned about the risk that terrorists will use ricin in a weapon than that states will.

In January 2003 six Algerian men were arrested by the London Metropolitan Police on suspicion of having produced ricin in a London flat. Police found an envelope in the flat containing cash and a number of recipes for making poisons, including ricin, and instructions for making explosives. Following the arrests, authorities stated publicly that traces of ricin were found in the flat. The police made several more arrests around the UK in the coming

<sup>376</sup> This account is based on Supreme Court of Judicature, Court of Appeal, Criminal Division, Case no. 2004/4217/C3, *Regina vs Kamel Bourgass*, Judgement of 19 July 2005; Carrell, S. and Whitacker, R., 'Ricin: the plot that never was', *The Independent*, 17 Apr. 2005; Smith, G., 'UK terror trial finds no terror: not guilty of conspiracy to poison London with ricin', National Security Notes, 11 Apr. 2005, <<http://www.globalsecurity.org/org/nsn/nsn-050411.htm>>; 'Four cleared of poison conspiracy', BBC News, <<http://news.bbc.co.uk/2/4441993.stm>>; and 'The ricin case timeline', BBC News, <<http://news.bbc.co.uk/2/4433459.stm>>.

<sup>377</sup> Protocol to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Annex A, p. 199; and Chemical Weapons Convention (note 21), Schedule 1(8). Article III of the CWC prohibits the production of all listed chemicals and precursors except where they are intended for purposes that are not prohibited and the types and quantities are consistent with such purposes.

<sup>378</sup> UNSCOM was established to implement the non-nuclear provisions of UN Security Council Resolution 687 of 3 April 1991, which established ceasefire conditions between Iraq and the coalition of UN member states, and to assist the IAEA in the nuclear areas.

weeks. The operation apparently followed a tip-off from French intelligence services that claimed the alleged activity was part of a larger terrorist plot linked to al-Qaeda. The British investigation into the alleged plot was carried out jointly by agents of the anti-terrorist branch of the Metropolitan Police and the counter-intelligence and security agency MI5.

The arrests were carried out under the 2000 Terrorism Act and the suspects were charged with having possessed articles ‘in circumstances which give rise to a reasonable suspicion that [this] is for a purpose connected with the commission, preparation or instigation of an act of terrorism’.<sup>379</sup> They were accused of producing the ricin for use in a terrorist attack on the London underground. The suspects were also charged under the 1996 Chemical Weapons Act for developing or producing a chemical weapon, but this charge was later dropped.<sup>380</sup> The arrest of another three men following a raid in Manchester was carried out by police and immigration officers. The arresting officers exercised powers under the 2001 Anti-Terrorism, Crime and Security Act to classify foreign nationals as ‘suspected terrorists’.<sup>381</sup>

Two days after the first arrests in London, the leader of the Biological Weapon Identification group at Porton Down determined that the tests for ricin carried out during the search at the London flat had yielded a false result—in fact, ricin had not been found. However, due to an apparent miscommunication, the authorities reported that Porton Down had confirmed the presence of ricin at the flat.<sup>382</sup> This statement fuelled huge interest in the ‘ricin ring’ and was used by Colin Powell to support his presen-

<sup>379</sup> Terrorism Act 2000 of 20 July 2000, Section 57(1). This and other British legislation is available in the UK Statute Law Database maintained by the Ministry of Justice, <<http://www.statutelaw.gov.uk/>>. Section 57 of the Terrorism Act 2000 has received sharp criticism for allowing a court to assume that a suspect is in possession of a product if it is found on premises at the same time as the suspect, unless the suspect can prove that he or she was unaware of it or did not have control over it. See e.g. Hammerton, J., ‘The Terrorism Act 2000: commentary’, 2000, available at <<http://www.magnacartaplus.org/bills/terrorism/>>.

<sup>380</sup> Chemical Weapons Act 1996 of 3 Apr. 1996, Section 2.

<sup>381</sup> Anti-terrorism, Crime and Security Act 2001 of 14 Dec. 2001, Part 4, Section 21(1)(a).

<sup>382</sup> The way in which this miscommunication occurred remains unclear. See e.g. Smith (note 376).

tation to the UN Security Council of the US case for military intervention in Iraq.

Eight men were charged with ‘conspiring together with other persons unknown to murder’ and conspiracy to ‘commit a public nuisance by the use of radioactive materials, toxic gases, chemicals and/or explosives to cause disruption, fear or injury’.<sup>383</sup> A first trial ended, in April 2005, with the acquittal of four men on both major charges (three were convicted of immigration-related offences). A fifth man, Kamel Bourgass—whose fingerprints had been found on the poison recipes—was convicted of conspiracy to commit a public nuisance and sentenced to 17 years’ imprisonment. The jury failed to reach a verdict on the conspiracy to murder charge against Bourgass. A second trial, which depended on the outcome of the first, was cancelled.

### *Reflections on the case*

As noted above, several acts could be used in the UK to prosecute suspected WMD-related offences. For example, if, in the ricin case, the prosecutor had found evidence to prove the initial suspicion that the arrested men had been trying to develop a WMD, both the 1996 Chemical Weapons Act implementing the CWC and the 1974 Biological Weapons Act implementing the BTWC could, in theory, have been applied simultaneously.<sup>384</sup> Furthermore, British citizens can be charged under the 2001 Anti-Terrorism, Crime and Security Act for the offences of aiding, abetting, counseling or procuring, or inciting persons who are not British nationals to commit acts related to the proliferation or use of WMD outside British territory.<sup>385</sup> The conspiracy charges against Bourgass and his co-defendants were brought under the 1977 Criminal Law Act, with reference to the 2000 Terrorism Act.

An additional challenge in relation to terrorism- and WMD-related cases for a prosecutor is to remain focused on factual evidence. Following the international incidents of recent years,

<sup>383</sup> Both charges were under the Criminal Law Act 1977 of 29 July 1977, Section 1(1), with reference to the Terrorism Act 2000 (note 379), sections 57 and 58.

<sup>384</sup> Biological Weapons Act 1974 of 8 Feb. 1974; and Chemical Weapons Act (note 380). On the BTWC and the CWC see notes 27 and 21, respectively.

<sup>385</sup> Anti-terrorism, Crime and Security Act 2001 (note 381), e.g. Section 4(3), on the freezing of assets.



governments have tended to react strongly to suspicions related to terrorism. The ricin case illustrates how this can lead to unsubstantiated allegations being treated as evidence of a major terrorist plot and even being used in justification of the invasion of a sovereign state. Also, after the passing of verdicts in the ricin case, US officials—still convinced that the defendants were in fact part of an international terrorist plot—questioned the ability of British authorities to secure convictions in major terrorist cases.<sup>386</sup> They asserted that the failure to find solid evidence of ricin production in the London flat was due to a lack of skills and technology. Such a statement, calling into question the verdict of a British court and, by extension, the innocence of the defendants, might be considered inappropriate, especially coming from a foreign government. That it should have been made highlights the high political profile of terrorism-related issues. It is true, however, that investigative capacities need to be strong and constantly updated in order to provide reliable evidence in major terrorism and proliferation cases.

### **Investigating and prosecuting dual-use export control violations in the United Kingdom**

In 1998 a White Paper outlined the case for a radical overhaul of the entire British export control system.<sup>387</sup> According to the paper, new legislation was needed to increase transparency and to provide for parliamentary scrutiny of strategic exports. The move came in the aftermath of a scandal triggered by the trial of a British firm, Matrix Churchill, that had been exporting to Iraq machine tools that could be used in weapons production during the Iran–Iraq War. The trial, which opened in 1991, collapsed when the government was forced to admit that it had relaxed controls on exports to Iraq without telling the parliament, and that it had allowed Matrix Churchill and other British firms to trade with Iraq even though it had been fully aware of the intended military end-use of some exports.<sup>388</sup>

<sup>386</sup> Hosenball, M. and Isikoff, M., “Terror Watch: what ricin?”, *Newsweek*, 13 Apr. 2005.

<sup>387</sup> British Department of Trade and Industry (DTI), *Strategic Export Controls*, White Paper, Cm 3989 (The Stationery Office: London, July 1998).

<sup>388</sup> For more on the Matrix Churchill case see Scott, R., *Report of the Inquiry into the Export of Defence Equipment and Dual-use Goods to Iraq and Related Prosecutions*,

Following the White Paper, the government started publishing annual reports on strategic export controls.<sup>389</sup> These reports are produced collaboratively by the various government departments involved in controlling exports and are intended to introduce a new level of monitoring and review. The reports include licensing decisions and information on specific issues that have emerged during the previous year. They are reviewed by the parliamentary Committees on Arms Export Controls.<sup>390</sup> Overall, the extensive restructuring of the British export control system in the past decade has resulted in greater transparency, all the way from legislative proposals to the issuance of authorizations. The main elements of the current system are outlined below.

### *Export control legislation governing dual-use items*

The British legislation relevant to controlling the export of dual-use goods includes the 2002 Export Control Act; the 1979 Customs and Excise Management Act (CEMA); the amended 2000 Terrorism Act and the 2001 Anti-Terrorism, Crime and Security Act; and secondary legislation, including the 2003 Export of Goods, Transfer of Technology and Provision of Technical Assistance Order and the 2003 Trade in Goods Control Order.<sup>391</sup>

(HMSO: London, 1996); McEldowney, J., 'The Scott Report: inquiries, parliamentary accountability and government control in Britain', *Democratization*, vol. 4, no. 4 (winter 1997); and 'Q & A: the Scott Report', BBC News, 27 Apr. 2004, <<http://news.bbc.co.uk/2/3631539.stm>>.

<sup>389</sup> The latest annual report on Strategic Export Controls is British Foreign and Commonwealth Office, Department for International Development, Ministry of Defence, and Department for Business, Enterprise and Regulatory Reform, *United Kingdom Strategic Export Controls: Annual Report 2007*, Cm 7451 (The Stationery Office: London, July 2008). This and other British Strategic Export Control reports are available at <<http://www.fco.gov.uk/en/about-the-fco/publications/publications/annual-reports/export-controls1/>>.

<sup>390</sup> The Committees on Arms Export Controls is an arrangement by which 4 parliamentary select committees—Business, Enterprise and Regulatory Reform; Defence; Foreign Affairs; and International Development—together review the British Government's expenditure and policy on, and administration of, strategic exports. This arrangement is intended to increase transparency and restore the balance between the British Government and Parliament in matters related to strategic exports. From its inception in 1999 until 2008, the name of this arrangement was the Quadripartite Committee (Committees on Strategic Export Controls).

<sup>391</sup> Export Control Act 2002 of 22 July 2002; Customs and Excise Management Act 1979 of 22 Feb. 1979; Terrorism Act 2000 (note 379); Anti-terrorism, Crime and Security Act 2001 (note 381); Export of Goods, Transfer of Technology and Provision of Technical

The 2002 Export Control Act includes clear guidance on the nature and purposes of export controls, including how, by whom and when controls can be imposed, as well as a set of trade controls covering related trafficking and brokering acts.<sup>392</sup> Deals arranged by or under the control of British persons that involve the acquisition or supply of controlled goods outside the UK can be penalized under the act.<sup>393</sup> Section 10 of the act includes a statutory obligation to produce an annual report on strategic export controls

Finally, the act states that the Secretary of State can impose export or trade controls in relation to any goods whose export, acquisition, disposal, movement or use could lead, directly or indirectly, to any of a list of 'relevant consequences'.<sup>394</sup> The list of consequences includes separate subsections on acts that could contribute to the development, production or use of WMD and on terrorism and crime. The inclusion of the latter section suggests that the legislators sought to incorporate counterterrorism elements in the British export control regime, probably in response to UN Security Council Resolution 1373 of 2001.<sup>395</sup> For this reason, the 2002 act should be read alongside the amended 2000 Terrorism Act and the 2001 Anti-Terrorism, Crime and Security Act.

The Anti-Terrorism, Crime and Security Act addresses a number of issues, including powers to deny terrorists access to their money or other property; freezing the assets of foreign nationals or governments that pose a threat to the British economy or to British nationals or residents; disclosure of information by public authorities for use in criminal investigations and prosecutions; immigra-

Assistance (Control) Order 2003 of 31 Oct. 2003, Statutory Instrument 2003/2764, as amended by the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) (Amendment) (no. 2) Order 2008 of 12 Dec. 2008, Statutory Instrument 2008/3161, which came into force on 2 Jan 2009; and Trade in Goods (Control) Order 2003 of 31 Oct. 2003, Statutory Instrument 2003/2764, as amended by the Trade in Goods (Categories of Controlled Goods) Order 2008 of 9 July 2008, Statutory Instrument 2008/1805, which came into force on 1 Oct. 2008. The amended versions of both orders together create a new structure for trade controls. The Terrorism Act 2006 of 30 Mar. 2006 introduced amendments to the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001 and other acts.

<sup>392</sup> Export Control Act 2002 (note 391), Section 4.

<sup>393</sup> Export Control Act 2002 (note 391), Section 4(8).

<sup>394</sup> Export Control Act 2002 (note 391), Schedule: categories of goods, technology and technical assistance, sections 2(1) and 2(4). The list of 'relevant consequences' is given in section 3(2) of the Schedule.

<sup>395</sup> UN Security Council Resolution 1373 (note 6).

tion and asylum procedures for suspected international terrorists; controls on WMD; the security of pathogens, toxins and nuclear sites and materials; the use of personal communications data during investigations and prosecutions; intelligence gathering outside British territory; bribery and corruption; and the obligation of carriers to disclose to law enforcement authorities information about the freight they are carrying.<sup>396</sup>

The 2002 Export Control Act has been described as ‘a work of consolidation as well as reform [that] sets powers that sweep away a rag-bag of secondary powers, and provides a coherent framework of controls, replacing past executive discretion with an appropriate level of parliamentary scrutiny.’<sup>397</sup> In addition to the new regulations increasing transparency, the law provides clear and explicit powers to impose controls on exports from the UK; on provision of technical assistance overseas; on the acquisition, disposal or movement of goods; and on other ‘trafficking and brokering’ activities—and, of course, powers to apply EU legislation for the control of dual-use goods. The Secretary of State is given the responsibility to provide and publish guidance on the exercise of licensing powers. Finally, the 2002 act establishes a principle of integrated controls, under which inter-departmental regulations enable government departments to coordinate their respective roles.<sup>398</sup>

The 1979 Customs and Excise Management Act is a general act of parliament consolidating the main customs enforcement powers of HM Revenue & Customs (HMRC). Offences related to breaches of export controls under the CEMA fall into two categories. The first comprises strict liability offences—those that lead to sanctions regardless of the knowledge or intent of the exporter, thus including acts of negligence.<sup>399</sup> Such offences are punishable by fines on a standard scale or of three times the value of the goods that have been illegally exported or been subject to an attempted illegal export. For less serious breaches, traders may have to pay a com-

<sup>396</sup> Anti-terrorism, Crime and Security Act 2001 (note 381), sections 1–3, 6–7, 10–12. See also *Anti-Terrorism, Crime and Security Act 2001: Explanatory Notes* (The Stationery Office: London, 22 Feb. 2002).

<sup>397</sup> Joyner, D., *Non-proliferation Export Controls: Origins, Challenges, and Proposals for Strengthening* (Ashgate: Farnham, 2006), p. 142.

<sup>398</sup> This principle is ultimately reflected in the system created through the establishment of the Committees on Arms Export Controls (see note 390).

<sup>399</sup> Customs and Excise Management Act 1979 (note 391), Section 68(1).

pound penalty or restoration fee.<sup>400</sup> The second category includes intentional violations of the controls. Possible sanctions on conviction include imprisonment for up to seven years in addition to, or instead of, an unlimited fine.<sup>401</sup> Similar sanctions are applied for intentional trafficking and brokering offences related to breaches of export controls.<sup>402</sup> The CEMA also makes liable the master of a ship or commander of an aircraft and any other persons involved in the unshipping, landing, relanding, unloading or carrying within the UK of goods originally intended for export from the UK if they do so without authority and without paying all required fees.<sup>403</sup>

### *Detection, investigation and prosecution procedures*

HMRC bears the primary responsibility for enforcing export controls on strategic goods. It shares this competence with the police. Whichever agency first detects a suspected offence is responsible for its investigation. However, most offences are detected by customs officials at the border or during trade audits, which HMRC is responsible for carrying out. HMRC and the police may also conduct joint investigations.

HMRC has a substantial staff of customs officers posted at sea and airports that see a large volume of freight traffic. These officers are supplemented by a mobile enforcement team that specifically targets exports of strategic goods, including dual-use items. One interesting aspect of the British system from the perspective of dual-use items is that inter-agency training operations are held that target strategic exports at ports and airports. These exercises, based on simulations of scenarios involving an illegal export of strategic goods, enable different agencies to identify their roles and improve coordination and cooperation with other agencies.

Suspected export violations investigated by HMRC are prosecuted by an independent entity, the Revenue and Customs Prosecutions Office (RCPO). The RCPO was created in 2005 in order to

<sup>400</sup> A compound penalty is a monetary payment in lieu of criminal proceedings, available under Customs and Excise Management Act 1979 (note 391), Section 152. A restoration fee is a payment for restoration of property seized by the customs service. Both penalties are only applicable in cases where the offender admits the violation.

<sup>401</sup> Customs and Excise Management Act 1979 (note 391), Section 68(3).

<sup>402</sup> Customs and Excise Management Act 1979 (note 391), Section 170(3).

<sup>403</sup> Customs and Excise Management Act 1979 (note 391), Section 67(1).

separate the investigation and prosecution functions for customs-related offences, which had previously been prosecuted by customs service prosecutors. With this new system, the relationship between the RCPO and HMRC was brought into line with that between the Crown Prosecution Service and the police. HMRC has stated that it would only refer an export control cases to the RCPO if it involved an intentional violation, a sensitive destination and particularly sensitive goods.<sup>404</sup>

In the British system, the decision to prosecute in a criminal case is based on two tests. The first is the evidential test: a prosecutor must determine that there is sufficient evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. The second is whether a prosecution is in the public interest. The presumption is that prosecution is in the public interest—a strong argument is needed to prevent prosecution on these grounds. The prerequisites for these tests are stipulated in the Code for Crown Prosecutors.<sup>405</sup> HMRC's policy is to refer for prosecution all intentional breaches of export controls under Section 68(2) of the CEMA and all strict liability offences under Section 68(1) where there are aggravating circumstances such as previous technical breaches, sensitive destinations, particularly sensitive goods or misuse of open licences.<sup>406</sup>

### Final remarks

In 2006 there were three convictions on charges under the 1979 CEMA.<sup>407</sup> It is hard to say whether this reflects a high or low rate of detection and prosecution, especially since some illicit exports result only in warnings, compound penalties or advisory guidance. Compared with many other EU member states, three prosecutions in a year is a significant number. However, the UK has a large dual-use goods industry.

<sup>404</sup> House of Commons, Defence, Foreign Affairs, International Development and Trade and Industry Committees, *Strategic Export Controls: 2007 Review*, First joint report of session 2006–2007, HC 117 (The Stationery Office: London, 7 Aug. 2007), p. 62.

<sup>405</sup> Crown Prosecution Service, Code for Crown Prosecutors, Nov. 2004, <<http://www.cps.gov.uk/publications/>>.

<sup>406</sup> HM Revenue & Customs, *Annual Report 2004–2005 and Autumn Performance Report 2005* (The Stationery Office: London, 19 Dec. 2005).

<sup>407</sup> See House of Commons, Defence, Foreign Affairs, International Development and Trade and Industry Committees, p. 65 (note 404).

One prosecution in 2005 concerned illegal procurements associated with missile systems and aircraft for the Iranian military. The investigation involved close international cooperation and coordination between governments and agencies involved in intelligence gathering. The offence was detected largely due to effective risk profiling, which brought the exporting company to the authorities' attention. Saroosh Homayouni and others had been indicted in the USA in 2001 after thousands of parts for military aircraft and missiles, bound for export to Iran, were discovered during a customs raid on the premises of their company, Multicore Ltd. British customs were informed, leading to the investigation of Saroosh's company Multicore London. Homayouni was convicted for knowingly exporting the goods in contravention of an export prohibition. He was sentenced to 18 months' imprisonment, suspended for two years, and was banned from being a company director for 10 years. Furthermore, an order was imposed to forfeit assets worth £70 000 (€101 477).<sup>408</sup>

In another prosecution, which ended in March 2008, a British businessman, Mehrdad Salashoor, was jailed for 18 months for illegally exporting to Iran navigation devices classified as dual-use items.<sup>409</sup> The British licensing authority, the Export Control Organization (then under the Department of Trade and Industry, which has since been replaced by the Department for Business, Enterprise and Regulatory Reform) informed Salashoor in 2006 that he would need an export licence for the devices if he wished to export them to Azerbaijan, as he had indicated. Instead of applying for a licence, Salashoor exported the goods to Malta with instructions for onward shipment to a company in Iran. When the Maltese

<sup>408</sup> Homayouni pleaded guilty to 12 specimen charges counts under Customs and Excise Management Act 1979 (note 391), Section 68(2), and was sentenced by Southwark Crown Court on 18 Feb. 2005. British Foreign and Commonwealth Office, Department for International Development, Ministry of Defence, and DTI, *United Kingdom Strategic Export Controls: Annual Report 2005*, Cm 6882 (The Stationery Office: London, 2006), p. 9; and [Globalsecurity.org](http://www.globalsecurity.org/military/world/iran/airforce-tech.htm), 'Aircraft spare parts acquisition', Iran military guide, 7 Oct. 2008, <<http://www.globalsecurity.org/military/world/iran/airforce-tech.htm>>.

<sup>409</sup> Salashoor pleaded guilty to 4 counts of 'being knowingly concerned in the exportation of goods' contrary to Section 68(2) of the Customs and Excise Management Act 1979 (note 391) and 1 count of perverting the course of justice. Three further counts relating to other illegal exports were ordered to lie on the file. HM Revenue & Customs, 'UK businessman jailed for Iran missile guidance exports', National news release, 14 Mar. 2008, Central Office of Information, News Distribution Service, <<http://nds.coi.gov.uk/>>.

authorities found that the Iranian company was in reality a front for the Iranian Ministry of Defence, it blocked the export and the goods were returned to the UK. Nevertheless, Salashoor then tried to divert two more of the devices to Iran via Norway. Besides the prison term, Salashoor was given a confiscation order for £432 970 (€547 121) under the 2002 Proceeds of Crime Act.<sup>410</sup>

These two cases are examples of prosecutions that have led to convictions thanks to the sharing of information between foreign intelligence services and enforcement agencies.

<sup>410</sup> Proceeds of Crime Act 2002 of 24 July 2002.



## 7. Conclusions

The existence of several multilateral structures reflects a broad agreement among exporting states on the goal and, to some extent, the means of controlling the export of dual-use items. But it is at the level of individual states that these export control regimes will, ultimately, succeed or fail. National export control legislation and enforcement systems should be regularly reviewed to ensure that they are as effective as possible in preventing the illicit export of dual-use items from the European Community. This final chapter comprises two sections: conclusions, revisiting the key themes of this study; and a set of recommendations that could serve as starting points for discussion around reviews of the relevant national legislation and enforcement systems.

### I. Conclusions

#### **National enforcement—common legislation**

The establishment of a clandestine WMD programme—whether by a state or by a non-state actor—always includes three phases. The first phase centres on taking the decision to initiate the programme and the setting of the programme's overall goals. The decision—which will be a political one in the case of a state—will be based on some degree of research into the possible shape, feasibility and implications of the programme. The costs and risks associated with a clandestine WMD programme are large and the activity is illegal, so this decision is taken before any procurement activity starts. The second phase entails acquiring the basic technologies and developing the required competences and skilled personnel. The goods, equipment and materials needed for developing and storing the weapons are procured in the third phase.

This is, of course, a simplified account of an inevitably complex process. However, it serves to show that there are several opportunities for interrupting and, it is to be hoped, stopping WMD proliferation. The means of doing so will be different in each phase. As this study argues, national export controls on dual-use items can be among the most appropriate tools in the third phase—but for them

to be effective in this regard, the relevant legislation must be strong and well enforced.

Most exporters of dual-use items would support the objective of export controls on dual-use items of preventing the proliferation of nuclear, biological or chemical weapons and their means of delivery. Thus, it is important that export control systems balance, on the one hand, assisting exporters who wish to abide by the law with, on the other, dissuading and penalizing those who are willing to circumvent it. This is not an easy task and states have taken different approaches to the problem which are reflected in their export control systems. Some states start from the assumption that all exporters are potentially illegal exporters; others prefer to trust their exporters; and still others apply a principle of trust-but-verify. Whichever approach is taken, it is necessary to conduct outreach to industry and others who potentially handle dual-use goods in order both to help exporters to abide by the law and to minimize the possibility that export controls are violated as a result of—real or feigned—ignorance of the licensing requirements.

The EU, the UN and the cooperative multilateral regimes, have all emphasized the need for effective enforcement of export controls. It is too late to undo the damage already caused by the illicit trade in European dual-use goods—known to have contributed to the WMD programmes of Iraq, Pakistan and others—but it is not too late to learn from experience and to consider new ways to prevent the further proliferation of WMD. One important lesson is that a lack of state control over dual-use items allows proliferation networks to operate unhindered. The EC Dual-use Regulation obliges states to control exports of dual-use goods. National legislation is a good—indeed essential—start, but to ensure compliance, national controls must be both enforceable and properly enforced. Their enforcement requires the active and competent involvement of national customs, police, intelligence and prosecution services. National legal frameworks for dual-use export controls should include proportionate and appropriate civil or criminal sanctions for dual-use export control violations and, importantly, accord with the principles of the rule of law.<sup>411</sup>

<sup>411</sup> Anthony, I., and Bauer, S., 'Controls on security-related international transfers', *SIPRI Yearbook 2007* (note 44), p. 663.

This reliance on individual states for the enforcement of common EC legislation presents the EU and its member states with a number of significant challenges. Since the legislation is adopted at the EU level, there is a risk that some national governments will not fully recognize their own responsibilities in relation to it. In 2006 a similar concern was noted in relation to the multilateral anti-proliferation regimes in a report for the WMD Commission.<sup>412</sup> The report's authors observed that states' implementation of international treaties such as the BTWC, the CWC and the NPT normally receives less critical attention than the treaties themselves and compliance is rarely, if ever, verified. The authors also presented anecdotal evidence suggesting that some states consider their national implementation of the treaties to be a purely legal or technical matter and less important than joining the treaty regimes in the first place. Finally, according to the report, states tend to pay less attention to provisions requiring national implementation measures in treaties concerning WMD than to equivalent provisions in treaties that have an impact on their economies, such as those regulating trade, transport, migration and the environment.

In the case of the EU, the risk that enforcement will be weak in the member states arises primarily from the way powers are distributed between the Council and the member states. With regard to the topic of this study, the main concern is that the national law enforcement communities in some of the member states do not appreciate how vital a role they have in enforcing the EC Dual-use Regulation—and that this will severely weaken the regime as a whole. Council regulations are directly binding on the member states. However, due to the principle of procedural autonomy for member states, it is difficult, at the EU level, to influence national

<sup>412</sup> Persbo, A. and Woodward, A., *National Measures to Implement WMD Treaties and Norms: The Need for International Standards and Technical Assistance*, Weapons of Mass Destruction Commission (WMDC), Paper no. 32 (WMDC: Stockholm, May 2005), <<http://www.wmdCommission.org/sida.asp?id=7>>. The WMDC—or Blix Commission, after its chairman, Hans Blix—was established in 2003 on the initiative of the Swedish Foreign Minister, Anna Lindh, acting on a proposal by the UN Under-Secretary-General for Disarmament Affairs, Jayantha Dhanapala. The Commission reported in 2006. Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms* (WMDC: Stockholm, 2006), <<http://www.wmdCommission.org/sida.asp?id=9>>.

compliance in matters that relate to their law enforcement and prosecution systems and the penalties they apply for export control violations. In the absence of mechanisms at the EU level to ensure the effective enforcement of this technically challenging common legislation it is additionally possible that weaknesses in the national systems will not be identified.

The division of powers between the EU and its member states does, however, provide a potential stimulus for much-needed national reviews of the export control systems designed to give force to implement the Dual-use Regulation. Such national reviews are far more likely to follow from amendments to the common legislation than they are to take place spontaneously. This makes it all the more important that the EC Dual-use Regulation is regularly updated. However, substantial revisions of the regulation require agreement among member states and the Commission in areas that bear on national commercial and security interests, so they can take time. A major revision of the Dual-Use Regulation to reflect Security Council Resolution 1540, negotiations for which began in early 2007, has still not been adopted at the time of writing.

Fortunately, another channel exists that could similarly act as a catalyst for reviews of the national export control systems governing dual-use items: the 1540 Committee, established to supervise national implementation of UN Security Council Resolution 1540. The 1540 Committee's reporting system obliges states to review their export control legislation and enforcement systems. While the national reports submitted to the committee vary in the level of detail they offer, they do, arguably, create a minimum standard of supervision of compliance. Failure to submit a national report also exposes a state and its export control system to scrutiny.

As regards the prospects for stronger EU monitoring of compliance with common legislation, new ground is apparently being broken in the environmental field. Trends emerging in EC environmental policy could also be followed in the area of export control. In response to intensified worldwide debate on the increased use of chemical substances causing challenges to human health and the environment as a whole, the EU has recently taken major steps to protect its territory and citizens from health risks and environmental damage caused by the use of chemical substances. One such initiative centres on the 2006 Registration, Evaluation and Author-

ization of Chemicals (REACH) Regulation.<sup>413</sup> The REACH Regulation seeks to balance, on the one hand, the protection of human health and the environment through better and earlier identification of the properties of chemical substances with, on the other hand, promoting the capability and competitiveness of the EU chemicals industry.<sup>414</sup> The system places responsibility for identifying the properties of chemicals and disclosing safety information, as well as for managing any safety risks, on the importers, producers and users of chemical substances. Compliance in relation to any submission can be verified by the European Chemicals Agency. A similar principle could be elaborated to reform the role played by industries producing dual-use goods in assessing the risk that their products could be used in WMD.

### **Improving national enforcement systems**

There is little doubt that only a relatively small part of the violations of the EC Dual-use Regulation that take place are currently detected and investigated. Even fewer result in prosecution. This situation may be exacerbated by the policies of some member states that reportedly refrain from bringing suspected violators to trial, probably due to a desire to protect domestic and EU industries. Whatever the reasons, the fact is that most EU member states have little or no experience of prosecuting export control violations related to dual-use goods.

The case studies described in chapter 6 illustrate the fact that even countries with long experience in investigating and prosecuting export control violations still face some fundamental problems in their national law enforcement systems. The elements of a good law enforcement system could be summarized as follows: a solid legal basis for action; clear allocation of tasks and responsibilities; clear procedures; and a means of preserving institutional memory, so that specialized knowledge and experience, once gained, are not

<sup>413</sup> Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 Dec. 2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, *Official Journal of the European Union*, L 396, 30 Dec. 2006, pp. 1-849.

<sup>414</sup> European Commission, Environment Directorate-General, 'REACH: what is REACH?', 14 Aug. 2007, <[http://ec.europa.eu/environment/chemicals/reach/reach\\_intro.htm](http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm)>.

lost.<sup>415</sup> This report is chiefly aimed at national law enforcement communities, intelligence services, prosecution services and—to some extent—judges. These groups can all make important contributions to the efficiency to the national enforcement of the common EU legislation. But to do this, they need to be aware of their potential functions in this regard. Interviews carried out by the author with operational officers in some of the EU member states give the impression that many are unfamiliar with aspects of the EC Dual-use Regulation. Clearly, there is a great need for education and awareness raising among these different groups.

One of the first questions that EU member states need to ask in reviewing their export control systems is whether they need to improve coordination and cooperation between the different actors. In most EU states there seem to be no overarching coordination: the task of identifying illicit exports of dual-use items rests with individual law enforcement actors and intelligence officers, while licensing authorities generally deal only with law-abiding exporters who apply for licences. As the licensing officials possess invaluable information on the character and potential military applications of manufactured goods, exporting industries and trade patterns, it makes sense to involve them in the detection phase. States that have not already done so could consider, among other things, establishing databases to share information between licensing authorities, customs authorities and other key actors.

### **Prosecution and penalties**

EU member states differ on the question of who should be held liable under the EU's export control regime. Member states are only obligated to include liability for the actual exporters in their national legislation.<sup>416</sup> However, other actors in the exporting chain may also share responsibility for an export control violation. Germany is an example of a country that includes liability for brokers and shippers in its national export control legislation. In most states, however, export control legislation only applies to the

<sup>415</sup> See Bauer, S. and Wetter, A., 'Approaches to enhanced prosecution and sanctions for dual-use export control violations', Presentation at the Eighth Annual International Export Control Conference, Bucharest, March 2007, <<http://www.sipri.org/contents/expcon/enforcement.html>>.

<sup>416</sup> The EC Dual-use Regulation (note 8) only addresses the duties of exporters.

exporter, but other actors can be charged under other legislation. For them to apply this alternative legislation, investigators and prosecutors must recognize the potential seriousness of the offence. Therefore, awareness-raising activities in these countries can help to ensure that people implicated at whatever stage of an illicit dual-use goods export face appropriate penalties.

An international debate is beginning about the contribution that criminal sanctions could make in combating WMD proliferation. Several recent international initiatives have emphasized the role of criminal law in export control enforcement. In the context of the PSI, the USA has proposed more active use of law enforcement and criminal justice procedures to tackle illicit trafficking in proliferation-sensitive items.<sup>417</sup> In addition, the multilateral export control regimes have begun to pay closer attention to law enforcement issues in general and to the function of criminal sanctions.<sup>418</sup>

While the EC Dual-use Regulation puts the selection of penalties entirely at the discretion of member states, the European Commission has proposed a revision requiring that member states have the option of criminal sanctions and some agreed minimum penalties for serious export control offences.<sup>419</sup> This proposal has been one of the main headaches for the negotiators of a new EC Dual-use Regulation. The Commission generally welcomes all ways of adding force to common legislation—as noted above, criminal sanctions are seen by many as both a deterrent to potential violators and a means of putting determined violators out of action by putting them behind bars. However, member states are reluctant to let EU law interfere with national criminal law. It will be interesting to see how the debate is influenced by the new competence of the Commission to impose common sanctions for breaches of common legislation established by the ECJ in the field of environmental protection.<sup>420</sup>

There is, too, far from universal agreement that criminal law has such an important place in the spectrum of enforcement options

<sup>417</sup> On the PSI see note 37.

<sup>418</sup> For discussion of the potential expanded role for the PSI and on the enforcement discussion in multilateral regimes see Anthony and Bauer (note 411), pp. 647–52.

<sup>419</sup> European Commission, Proposal for a Council Regulation of 18 Dec. 2006 setting up a Community regime for the control of exports of dual-use items and technology, COM(2006) 829.

<sup>420</sup> On these ECJ rulings see chapter 4, section IV, in this volume.

for export control violations. It should be noted that even when criminal sanctions are available in national legislation, export control crimes tend to be in the category of minor offences, giving little incentive to prosecutors and law enforcement personnel who prefer to expend their limited resources on more serious offences. The deterrent function attributed to criminal penalties is disputed.

From the perspective of this study, the important question for the EU member states to consider is what penalties would best fit the severity of export-related offences. On the one hand, the potential contribution of heavy fines, revocation of the right to use simplified procedures and other administrative sanctions in deterring companies assisting proliferators should not be underestimated. On the other, the available penalties should be strong enough to reflect the potential harm to international security posed by illicit dual-use exports and to counterbalance the sometimes huge financial and other benefits that export control violators and proliferators expect to gain.

Recalling that effective law enforcement and prosecutions—which must respect the right to fair trial established by Article 6 of the European Convention on Human Rights—are essential to the enforcement of the EU's export control legislation, another important question is how to involve European prosecutors more actively in the fight against the illegal trade in dual-use items. In the wake of the terrorist attacks on the USA of 2001, many states have seen a need to revise their national terrorist legislation to adapt it to current threats—something they are also obligated to do by UN Security Council Resolution 1373.<sup>421</sup> Combating terrorism and combating the misuse of dual-use items can be directly linked, as is shown by the UK case study in chapter 6. However, it is important to emphasize that the threat of WMD proliferation is a separate issue from terrorism and deserves an equal amount of attention. For example, Eurojust could be given an explicit mandate to coordinate the work of prosecutors in the area of export control violations similar to that which it has in the area of counterterrorism.<sup>422</sup>

<sup>421</sup> UN Security Council Resolution 1373 (note 6).

<sup>422</sup> As noted in chapter 5, section III, the lack of a standard definition of 'organized crime' renders Eurojust's mandate in this area inadequate for combating the traffic in dual-use items.



In addition to the variety of prosecution policies and applicable sanctions in the EU member states related to export controls, there are also differences in how far states put the decision to take a case to trial in the hands of prosecutors. Depending on the jurisdiction, prosecutions in export control cases may be initiated by the police, by the customs office, by the office of the public prosecutor or by others. In practice, when prosecutors have some degree of freedom in this matter there is a risk that such decisions are governed primarily by considerations of time and financial resources.

The complex and technical nature of the export control legislation may also deter a prosecutor who has the freedom to choose whether or not to press charges. In most EU countries the prosecutor usually has to prove that the suspect has, at least passively, confirmed that the exported goods were destined for WMD proliferation if the suspect is to be convicted of a serious export control-related offence. If this intent cannot be proved, the prosecutor has to fall back on subsidiary legislation—for example to bring charges of submitting falsified documents to the licensing authority, which would usually be under a provision of the national penal code. As these and similar offences under subsidiary legislation are likely to be seen by a court as technical offences and thus carry low penalties, there would again be little incentive to prosecute. Irrespective of the systems that prosecutors work under—be they inquisitorial or accusatorial and whatever degree of prosecutorial discretion they provide—all EU prosecutors with responsibility for enforcing the export control laws must be trained in applying the export control legislation governing dual-use goods.

As this study has shown, some EU member states responded quickly when covert procurement activities linked to WMD proliferation were revealed in the 1990s and 2000s. These states took numerous countermeasures, including strengthening their export control legislation and enforcement systems. However, these countries were in a minority. The majority of EU member states, despite learning that their industries could be inadvertently contributing to WMD proliferation, took little or no action. Even today, as some states are prosecuting cases of illicit trafficking in dual-use items with increasing frequency, many of their neighbours have still not taken adequate steps to ensure that WMD proliferators cannot procure vital goods, equipment and technologies on their terri-

tories. This shows a failure, or perhaps an unwillingness, to learn from the mistakes of others. This is a major problem for the EU.

The Customs Union brings unquestionable economic advantages for member states. But the free movement of goods in the internal market also means that weak export controls in one country can seriously undermine—and even render futile—the efforts of other states to prevent WMD proliferation by carefully controlling the export of dual-use goods. This makes it all the more important for the EU as a whole that every member state shoulders its share of responsibility and maintains strong and effective national legislation and enforcement systems to control exports of dual-use goods.

## II. Recommendations<sup>423</sup>

This section offers recommendations on the structure and enforcement of national controls on exports of dual-use goods. They are intended primarily for the legislators, policymakers and officials involved in shaping, reviewing and overseeing national export control systems, whether in the EU or elsewhere. They should also be of interest to customs officers, investigators, prosecutors and others involved in enforcing export controls regulations.

Recommendations are given for the national legislation intended to give force to international obligations on controlling exports of dual-use goods and for the various stages of the enforcement process, including prosecution. Some more generic recommendations are also included. A numbered list of recommendations is given under each heading, followed by paragraphs explaining and expanding on those recommendations.

When reviewing national export controls on dual-use goods, it is worth remembering that the overarching goal of the controls is to prevent the goods being illegally exported to a destination where there is a significant risk that they will be used for the proliferation of WMD or put to other undesirable military uses. Thus, national systems should be set up such that, to the greatest extent achievable, dual-use goods are prevented from leaving the state's juris-

<sup>423</sup> These recommendations were developed collaboratively by the author with the SIPRI Export Control Project.

diction without all possible assurance that they will not be diverted to sensitive destinations.

### **National legislation**

1. National legislation governing export controls on dual-use goods should be comprehensible and accessible to all actors in the exporting chain and to all those involved in enforcing export controls.

2. It should include specific provisions for export control related offences.

3. It should include regularly updated control lists and a catch-all instrument.

4. It should include provisions covering (a) violations committed through negligence and with intent, (b) attempted violations, and (c) conspiracy by other actors in the exporting chain.

5. It should provide for sanctions that are both an effective deterrent and are proportionate to the offence.

6. The legislation should be regularly reviewed and updated.

All legislation should be publicly accessible and as clear and comprehensible as possible, in line with the principles of the rule of law. This is particularly challenging in the context of the EU, given that EU member states' national export control legislation must take into account not only (a) international rules found in the non-proliferation conventions and in UN Security Council resolutions; (b) the guidelines on export control of dual-use items agreed between the members of the multilateral export control regimes; and (c) other national laws and legal traditions; but also (d) EU legislation and (e) the principle of the free movement of goods in the Customs Union.<sup>424</sup>

Systematizing the export control laws in a way that makes it easy for prosecutors to determine which legislation is applicable in a specific case could also contribute to making legislation more effective—and thus to non-proliferation goals. It is thus advisable to adopt special legislation governing export control violations.

<sup>424</sup> The TEU allows for exceptions based on national security considerations. Treaty on European Union (note 80), Article 296.

Security Council Resolution 1540 calls on all states to maintain national lists of controlled dual-use items. These lists should be kept up to date with the control lists of the multilateral export control regimes. A catch-all clause is an essential complement to the national control list.

Legal provisions covering export control violations committed through negligence can help to motivate exporters, manufacturers and others to be cautious and to keep themselves informed of licensing requirements. The provisions should also allow differentiation between degrees and types of intent—whether the offenders were aware of the proliferation risk and whether they actually intended to contribute to proliferation. Specific sanctions for attempted export control violations under the national export control legislation could also help to inspire caution and discourage potential violators. Making other actors in the exporting chain besides exporters—for example brokers, manufacturers, shippers, traders and financiers—potentially liable for export control violations through an offence of conspiracy, can help to disrupt the activities of proliferation networks and ensure that the real initiators of the illegal activity do not escape punishment.

The sanctions applied for export control violations should be proportionate to the offence and effective in achieving their intended purpose. While they should reflect the potential harm caused by the offence, they should also clearly distinguish between offences committed intent and acts of negligence. Administrative sanctions and criminal sanctions both have potential roles to play. The threat of financial penalties, losing export privileges, confiscation and possibly destruction of assets and so on may be more effective in deterring companies from being careless in their export procedures, while a potential prison sentence will be more effective in deterring—and incapacitating—those who are knowingly exporting unauthorized dual-use items to potential proliferators for profit. Proportionality to the consequences of the violation should also be considered—e.g. whether a licence would have been granted if applied for, or if the export effectively contributed to a WMD programme.

Finally, national legislation should be regularly reviewed and updated. Policymakers should identify and respond to weaknesses in the current legislation exposed by actual cases, as well as

changes in, for example, the international political situation related to exports of dual-use items, technological developments, and production and trading patterns in general. Definitions of key terms must be clear and may need to be revised, as they are often subject to review at the international level or are revealed during attempts to apply the legislation to be insufficient or ineffective

### **Communication, coordination and cooperation**

1. Structural mechanisms should be established that facilitate coordination, communication and cooperation in the different stages of export control enforcement at the international, inter-agency and intra-agency levels.

2. Mechanisms should be established for the sharing of experiences and learning within and between agencies, countries and export control regimes.

No individual agency or even country can successfully monitor proliferation risks or detect and prevent proliferation-sensitive exports of dual-use exports alone, especially considering the complex scope and structure of export controls. Cooperation, coordination and communication are therefore essential. Coordination requires clear identification of roles and responsibilities. Both routine and flexible procedures should be established at all levels to allow quick and effective communication. States should also invest in the necessary information technology to facilitate communication and participate in initiatives such as the EU's e-Customs and the Export Control System.

The value of international cooperation in preventing, detecting and investigating unauthorized exports of dual-use goods cannot be overstated. Without such cooperation, it can be difficult to amass sufficient evidence to initiate a prosecution, let alone to secure a conviction. States—including, where appropriate, their enforcement authorities—should be represented in international forums at which export controls on dual-use goods are discussed and make full use of the opportunities that such forums offer. When states commit to international cooperation agreements, it is essential that they establish the mechanisms necessary to fulfil those commitments.

It is also strongly recommended that each state should create mechanisms to facilitate cooperation and communication at the inter-agency level—that is, between licensing authorities, customs authorities, the police, the border police, the intelligence services, the foreign ministry and the public prosecution office. Infrastructure and clear guidance are needed that enable agencies to share risk analyses, risk profiles and other relevant information. If it does not conflict with national laws and norms, the agencies could make their relevant databases accessible to other agencies involved in enforcing export controls or, even better, establish common databases. The aim should be to avoid situations where export controls fail because officials in one agency were unaware of, or could not easily access, crucial information held by another agency.

A third level at which mechanisms and procedures for communication, coordination and cooperation should be developed is within agencies—for example, linking a customs agency's border posts, inland customs clearance houses and headquarters. This will not only enhance the work of each unit but also allow agencies to gather expertise in one unit and thus avoid duplication. Additionally, all possible obstacles to cooperation must be removed, down to the interpersonal level—the effectiveness of export controls depends to a great extent on the work, and cooperation, of the individuals concerned.

Finally, states could organize regular joint exercises involving the various agencies involved in the detection, investigation and interception of unauthorized exports of dual-use goods. The multilateral regimes and other international and regional forums in which export control issues are discussed might provide good opportunities for arranging and even staging such exercises.

### **Detection**

1. Effective intelligence-based monitoring systems should be established to identify suspicious activity.
2. A centralized risk management system should be established and effectively used.
3. Customs officers should be equipped with the information, guidance and training they need in order to identify consignments

of dual-use goods and suspicious export activities, including risk profiles.

4. The appropriate officers—for example, licensing or customs officers—should be given the authority and necessary powers to conduct trade audits.

The very different structures and powers that intelligence services are given in different countries make it difficult to provide detailed recommendations for how these agencies should be involved in detecting dual-use export control violations. It is important, however, that some kind of monitoring system is in place. This system should include infrastructural mechanisms to help intelligence services cooperate with other agencies in the identification of trafficking routes and procurement patterns, potential violators and suspicious financial activities. Also, it should provide intelligence services, enforcement agencies or both with the powers they need in order to detect illegal export activities—for example, monitoring and interception of telecommunications and mail—so long as these powers are compatible with national and international law.

Risk management is the key to the enforcement of export controls where the volume of trade is high. For risk analysis mechanisms to be effective, it is essential that intelligence services and other relevant actors have access to current and historical data about the movements of items. These mechanisms should be user-friendly, making data easy to browse, compare and collate. Also, indicators of risk should be developed and risk profiles that identify sensitive routes, persons, items and destinations should be created and shared with the appropriate actors.

Customs officers cannot be expected to identify all proliferation-sensitive goods during physical examinations, but they should be given adequate training, incentives and information to identify suspect consignments and export activities either during the export registration process or during physical examination of a consignment. These officers should have easy access to risk profiles. They should also be given clear and practical guidelines, including lists of agencies to contact and standard procedures to follow if their suspicions are aroused.

Trade audits offer another good opportunity for the detection of illegal export activities by bringing to light, for example, suspect financial transactions. It is thus important that the appropriate officers are authorized to examine company accounts and are trained to be alert to potentially illegal transfers of dual-use goods. It is also important that companies have a clear obligation to provide auditors with the necessary documents and information on request. Auditors' powers should include the use, under specific conditions, of coercive means, such as seizing electronically stored data, if a company does not cooperate.

### **Investigation**

1. There should be a clear division of tasks and legal powers relating to the investigation of dual-use export offences, both between and within the investigative agencies.

2. Clear guidance should be drafted and disseminated on when judicial approval is required for proceeding with an investigation.

3. Information sharing between all agencies involved in enforcing export controls including, to the extent possible, the intelligence services, should be encouraged and facilitated.

4. The relevant investigating units should have legal powers to search premises, access bank and credit records, conduct surveillance of electronic communications and telecommunications, and confiscate goods.

5. Mechanisms and procedures should be established for cooperation between investigative agencies, both within states and across borders, for example using extradition.

6. Systems should be created to maintain institutional memory.

Many states have systems where several agencies, for example the customs agency, the border police and the intelligence services, may have parallel competences to investigate export control violations. Clear guidelines specifying the agencies' respective competences and legal powers are needed to prevent them duplicating or even hindering each other's investigations. Coordination and cooperation of investigations often rely on relationships developed by individuals, as relevant inter-agency agreements do not exist in



many states. The role of everyone within each of the agencies should also be clear.

Due to the complex nature of the dual-use export control legislation, the best solution is for as much expertise as possible to be gathered within one investigation agency or one inter-agency network. This highlights the importance of maintaining institutional memory. Care should be taken that expertise is not lost over time, particularly as a result of staff changes. Experiences in investigation should be documented and lessons and outcomes shared both within and—as long as it does not conflict with national laws and norms—between agencies. Proper handovers are essential when the head of an ongoing investigation changes, so a successor should be identified well in advance.

Depending on the national system, several prosecution offices could be competent to provide judicial approval to open a formal investigation. The division of competence between these offices should be clear to all in order to minimize the risk of compromising a case due to procedural errors or oversights.

It is essential for investigators of export control-related offences to have the legal powers to search premises, access bank and credit records, carry out surveillance of electronic communications and telecommunications, and confiscate goods. Investigators must be aware of when judicial approval is required from a prosecutor to exercise certain investigative powers and understand the importance of obtaining this approval at the appropriate time so that their evidence is admissible in court. Investigators should have the authority to operate within the whole physical territory of the country, including free-trade zones or similar.

Since export violations are likely to involve activities in many countries, investigators may need authorization to cooperate with counterparts in other countries. Bilateral agreements should be reached that regulate, for example, extradition and mutual assistance procedures in criminal matters.

## **Prosecution**

1. Clear guidelines should be developed and disseminated for identifying which prosecution office should take a case, if more than one is competent to prosecute.

2. Efforts should be made to raise awareness among prosecutors of the role that prosecution could play in non-proliferation of WMD.

3. To the extent possible, coordination should be encouraged between prosecution offices and the intelligence services.

4. Systems should be created to maintain institutional memory, both domestically and internationally.

It is not always clear which prosecution office is the most appropriate to open charges against a suspected export control offender. In addition, in some national systems both public prosecutors and customs prosecutors may be competent to open charges. Clear guidelines should be available on how to identify the appropriate prosecution office. Preferably, export control crimes related to dual-use goods should be prosecuted at the central level, and not at the district level, if the national legal system allows it.

Prosecutors need to appreciate the potential severity of dual-use export control crimes. In legal systems where cases are not automatically brought to trial, this could help prosecutors to identify the public interest in prosecuting an export control-related offence. Also, prosecutors' understanding of the risks that illegal exports of dual-use goods could entail affects their decisions regarding investigations, the construction of their case and the penalties they seek.

Export-related crimes can present prosecutors with numerous challenges. Some of these are related to the fact that the crimes are often planned in one country and carried out in another. This makes it difficult to secure evidence to prove intent to proliferate WMD and to call witnesses who are abroad. Bilateral agreements must be put in place to deal with the problem of internationally organized criminal activity. Such agreements should include procedures for extradition and mutual assistance in criminal matters. Given the nature of international trade, states should look beyond their neighbours when seeking to conclude such agreements.

Prosecutions of export-related offences frequently require evidence that has been collected by intelligence services. However, there are often restrictions on the presentation in court of evidence gathered by intelligence services due to, for example, reasons of national security or protection of sources. In cases where infor-

mation leading to the detection of a dual-use export violation has originally come from a foreign intelligence service, the national intelligence service will need approval from the original provider of the evidence before presenting it to the prosecutor. Coordination should be encouraged between prosecution offices and intelligence services in order to minimize conflicts of interest.

Finally, to ensure that the expertise amassed by individual prosecutors can be kept within the prosecution service, it is essential to create systems to preserve institutional memory, both domestically and between states.

### **Outreach to industry**

1. Outreach activities concerning export controls should be conducted with businesses and research institutions involved in the manufacture, import and export of dual-use goods.

2. Businesses should be encouraged to establish internal compliance systems relating to the management and transfer of dual-use goods.

Given the appropriate information and understanding, the great majority of manufacturers, importers and exporters will try to abide by export control regulations. All actors in the exporting chain should be fully aware of the correct procedures, including the licensing requirements. It is also crucial that these actors understand the rationale of an export control system, including the risks that may arise from illegal exports of dual-use items. These aims can largely be achieved through outreach activities and tools in order to ensure that individuals and companies are aware of the licensing requirements, correct export procedures and the relevant legislation. By establishing effective internal compliance systems, companies can avoid aiding or committing violations of export control laws. States should offer them incentives and support to establish such systems.

## Appendix A. National sanctions for dual-use export control violations in the European Union

Member state	Criminal sanctions (sanctions applied)	Administrative sanctions	Strict liability	Experience of investigation or prosecution
Austria	Yes (fines and max. 5 years)	Yes	Yes	Yes
Belgium	Yes (max. 5 years)	..	..	..
Cyprus	Yes (max. 3 years)	Yes	Yes	..
Czech Republic	Yes (max. 8 years)	Yes	No	..
Denmark	Yes (max. 2 years; max. 6 years with aggravated circumstances)	No	Yes	..
Estonia	Yes (max. 12 years)	Yes	No	..
Finland	Yes (max. 4 years)	Yes	Yes	No

France	Yes (max. 3 years; 10-30 years for cases that threaten the fundamental interests of the state)	Yes (‘to be confirmed’)	Yes	..
Germany	Yes (max. 15 years)	Yes	Yes	Yes
Greece	Yes (max. 2 years)	Yes	Yes	..
Hungary	Yes (max. 5 years)	No	Yes	No
Ireland	Yes (max. 1 year)	Yes	Yes	No
Italy	Yes (max. 6 years)	Yes	Yes	Yes
Latvia	Yes (max. 10 years)	Yes	No	Yes
Lithuania	Yes (max. 10 years)	Yes	No	..
Luxembourg	Yes (max. 1 year)	..	..	..
Malta	Yes (max. 5 years)	No	Yes	..
Netherlands	Yes (max. 6 years)	Yes	Yes	Yes
Poland	Yes (max. 10 years)	Yes	Yes	Yes
Portugal	Yes (max. 2 years)	..	..	..

Member state	Criminal sanctions (sanctions applied)	Administrative sanctions	Strict liability	Experience of investigation or prosecution
Slovakia	Yes (max. 8 years)	Yes	No	Yes
Slovenia	Yes (fines only)	Yes	No	..
Spain	Yes (max. 6 years)	Yes	No	..
Sweden	Yes (max. 6 years)	No	Yes	Yes
UK	Yes (max. 10 years)	No	Yes	Yes

.. = no answer provided; Years = years of imprisonment.

Note: Bulgaria and Romania were not members of the European Union at the time of the survey.

Sources: European Commission, Directorate-General for Trade, Working Party on Dual-use Goods, Report on the answers to the questionnaire DS6/2005 rev 3 on existing sanctions—implementation of Article 19 of Council Regulation 1334/2000, DS 37/4/2005 Rev. 4, 11 May 2006; and 'Sanctions imposed by EU Member states for violations of export control legislation', Draft Rev. 14, Sep. 2005.

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